Nos. 14945–14946

United States
Court of Appeals
for the Ninth Circuit

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes

Volume II
(Pages 137 to 289)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 5-4-56

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Nos. 13,197-T and 15,804-T

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OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Defendants.

Honorable Ernest M. Tolin, Judge, Presiding.

REPORTERS' TRANSCRIPT OF PROCEEDINGS

Thursday, May 26, 1955

Appearances:

For the Plaintiff:

JOHNSTON & LUCKING, By
WILLIAM ALFRED LUCKING, JR., ESQ., and
WILLIAM ALFRED LUCKING, SR., ESQ.

For the Defendants:

JAMES C. HOLLINGSWORTH, ESQ.

Mr. Lucking, Jr.: * * *

Now, just to refresh the court's memory on the nature of these actions, the first action was brought as a stockholders' class action. The stockholders' representative, represented, being primarily and principally the home owner stockholders of the Ojai Mutual Water Company. That is not a derivative action, the first one. That is brought by the stockholders, by the plaintiff Lucking on behalf of the stockholders, himself, in the stockholders' own right.

The second action, also a stockholders' class action, is truly a derivative action, brought on behalf of the corporation, the Ojai Mutual Water Company, complaining of certain wrongs to the corporation.

Now, although I know the court has in the past become familiar with some of the facts of this first action, I would briefly like to refresh the court's memory on the contentions and so on. Then after I am through the plaintiff in the second action in pro per will add a few remarks which are peculiar to the second action and not involved in the first one.

Now, at the outset, we want to assure the court that these actions were brought strictly as stockholders' class actions. We feel that personalities or persons have nothing to do with it, but it is strictly business.

Now, the plaintiff, of course, recognizes, he [3*]

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

having practiced law for many years, that the court will guard the interests of all of the stockholders who are similarly situated. Principally those who are the homeowners, and that no relief will be afforded to this plaintiff or to any other class plaintiff that would be inequitable to any of the others. [4]

* * *

Mr. Hollingsworth: May it please the court, counsel, it is our contention, your Honor, that—I will be conservative—over 90 per cent of the allegations contained in the plaintiff's complaint are purely matters of law, which, on the face of the pleading itself, conclusively and, as a matter of substantive law, show that the plaintiff has no case in this court.

Before I expatiate a little on that, I want to make a few preliminary remarks. It is our contention, your Honor, and we feel confident that the proof will support it, that this is in no sense of the word a class action. For over 35 years the Water Company and the Valley Company, for that matter, if their theory be correct, they are a unity and identical, has never had one complaint relative to water service, distribution of water in any manner, shape or form.

We confidently assert before your Honor that no stockholder in the Mutual Water Company is one bit interested in this lawsuit, with the exception of Mr. Lucking, Sr., and Jr. He has repeatedly said to this court that this is a class action.

It is a strange thing, your Honor, that for 35 years, with some 125 or 130 customers getting

water from the Mutual, that a Sphinx silence would have been maintained all over the years relative to the conduct of the Water Company or the Valley Company, until Mr. Lucking decided to file this suit. [42]

I would like him to stand up and bring into this court any person, firm, association or corporation that will take an oath and look at your Honor and tell him that they are dissatisfied, that they are being treated or have been treated or expect to be treated unfairly, unjustly and inequitably.

This pathetic appeal that he makes to your Honor about his holdings and his property and his acreage and his stock, despite the fact we are serving customers in the Valley, may it please the court, whose interests, financially speaking, far exceed any interests that Mr. Lucking might have up there, and from whom we have never yet received a complaint of any kind as to the amount of water, as to its method of distribution or anything connected with the conduct, the management or operation of the Water Company.

Now, that is enough for that. I could go on, but I am going to come back to the fundamental law in this case. First of all, the Articles of Incorporation of the Water Company conclusively show a described surface area by metes and bounds description, filed with the Secretary of State of this State, showing that the area entitled to water from the Mutual is 2,765 acres in extent. We expect the proof to show that a certain number of those acres are what is known, or what are known as waste-

lands, and not capable of residential development or commercial exploitation, and that consequently it is not reasonably practicable that that particular acreage should [43] be served with any water at any time.

But we do expect to show that still remaining in this area, in view of the rapid and progressive growth that has taken place in Ojai, as well as other parts of Southern California, that there still remains well in excess of a thousand acres of land where people can build a home, put up a residence, buy a share of stock in the Mutual Water Company, and get water like all the other customers have been getting over the years.

Now, the Articles do not restrict, they do not limit, they do not qualify in the slightest degree the sale or distribution of water to what Mr. Lucking has conjured up in his mind and has put forth in his pleadings, that it must be restricted to the so-called Libbey lands, a perfectly meaningless phrase.

But I take it to mean, and from statements that have been made before this court, that only those who are entitled to water in this specified designated area of 2,765 acres are those who obtain title through Libbey or Mrs. Libbey, or the Valley Company through Libbey.

Your Honor, if I ever made a statement to a court, that is the most unsound, unsupported statement that I have ever listened to. There is no such thing in the Articles of Incorporation of this company, restricting the delivery and use of water on what Mr. Lucking calls the so-called Libbey

lands. [44] We furnish water to the State of California. We furnish water to the Villanova School. We furnish water to the high school. We furnish water to the Cretonya Institute. We furnish water to here and there and other users, none, your Honor, who ever acquired title from Libbey.

The testimony will show that the very first users after the organization of the Water Company were stockholders who did not derive title from Libbey or, as Mr. Lucking says, the so-called Libbey interests. That goes right down to date.

Completely refuting and completely contradicting this basic theory in his complaint, that we are treating him unjustly, unfairly and inequitably, because we furnish water, for example, to the State of California or to Villanova School, for example. Very true, Villanova School doesn't have as many acres as Mr. Lucking, but they have all the stock they need to supply water for their needs. The same thing is true of the high school. There is no argument about that.

Now, I say that to your Honor because the complaint on its face and the exhibits attached thereto, the Articles of Incorporation and the amendments thereto, conclusively show on their face that we are under no duty, no obligation, legally or equitably, to retire our stock after the so-called Libbey lands have been disposed of. Nor are we going to stand to have them confiscated or expropriated or any other method that Mr. Lucking might be suggesting to this court, because the [45] history of the companies will show back in 1920, when the Mutual

was organized, some two years prior to the organization of the Valley Company, that Mr. Libbey, one of the angels, I might say, of the Ojai Valley, in a search for water, in order to supply the area, to develop it, to promote it, had a vision and he went and hired the best engineering talent he could hire and he drilled a well and he got a good one. [46]

He organized his water company, not only for the land he owned, but for the land, the area taking in practically the entire western end of the Valley, including the city of Ojai.

What happened? Well, over a hundred thousand dollars was expended in the early creation of the facility , the well, the pipelines, the storage facilities for this little water company. So he turned it over eventually, as time overtook him, he transferred it, all the stock in the Ojai Mutual Water Company to the Valley Company, representing in excess of a hundred thousand dollars.

The Valley Company had the stock which they had a legal right to have.

The Court: Are you going to contend here that this was not in fact a mutual company?

Mr. Hollingsworth: No, your Honor, not at all. We expect, your Honor, that the testimony here will show that nobody could get water that didn't own stock in the Mutual Water Company.

And, furthermore, that that stock was nonappurtenant. That is another point I want to come to.

The Court: What is the definition of a mutual company?

Mr. Hollingsworth: Well, I don't know, your Honor. I have given that a lot of thought. As I understand, it is just an association of stockholders who are entitled to water from a common [47] source.

The Court: Every owner of stock in a mutual company is entitled to participate in the water or whatever it is that the company has?

Mr. Hollingsworth: If he owns stock.

The Court: If he owns stock.

Mr. Hollingsworth: That is correct, your Honor.

The Court: It doesn't mean, as I understand it generally, though, that the mutual company cannot sell water or whatever commodity it has to outsiders?

Mr. Hollingsworth: They didn't. The point is Mr. Libbey had the stock, your Honor. The Mutual never sold the stock to the Valley. It was owned by Mr. Libbey in return for the investment that he had put in. He owned it. It was his property, just the same as an automobile or a bank account or anything else.

He turned it over to the Valley Company. The Valley Company couldn't use it. They couldn't get any water. They never have had a drop of water from the Mutual Company.

The only way that anybody can get water is pursuant to the Articles of Incorporation. One, you have to own stock, but the Articles expressly provide that the mere ownership of stock does not entitle you to any water.

You have to own land in the service area. If you

own land in the service area and stock in the water company, then, according to the bylaws and the Articles of Incorporation, you [48] are entitled to water service if you purchase stock in the Mutual.

Now, that is the setup and there are a thousand setups of that kind in California. That is the conventional, customary, everyday setup for a mutual water company.

Now, furthermore, Mr. Lucking's whole complaint —and I come to another basic issue of law—is based upon the proposition that this stock is appurtenant.

Under the Articles and under the bylaws it is expressly provided that it is not appurtenant. Mr. Lucking's stock is not appurtenant, as he well knows. He can sell that stock to anybody he wants to, without selling his land.

And if he should sell it to somebody that owns land in the service area, and there is water, they would be entitled to water by virtue of the ownership of land in the service area and in the Mutual.

Now, that is a basic matter of law, your Honor, that appears right on the face of the Complaint and under Section 324 of the Civil Code. The only way that you can make water stock appurtenant to land is to adopt a bylaw to that effect and have it recorded in the Office of the County Recorder. That is Section 324.

Yet they have stood here before your Honor and have told you that the amendment to the bylaws in 1935 is void ab initio. What is void about it? [49]

All they had to do was to look at Section 324—I mean—it is Section 327, I think. I have the old '35

code here. I went to great trouble to get it. I gave your Honor at one time in this case a photostatic copy of those sections and furnished counsel with them. I now have the code with me in my file. That Code expressly provides that an amendment to the Articles may be made at a regular meeting of the corporation by, at least, two-thirds of the stock present.

We allege and set forth in our Complaint in 1935 that development in the area had progressed to the point where it was quite apparent to us that if we had to issue a share of stock for each quarter acre of land, as some of it was originally issued to Mr. Lucking, we wouldn't have enough stock to take care of the service area; not the Libbey lands, your Honor.

We had plenty of stock for Libbey lands, so-called. We didn't have to amend the Articles for that purpose. But we alleged and we intend to show those Articles were amended to take care of a progressive growth and development in that area, so we would have enough stock to go around on the basis of one share per acre, instead of four shares per acre, which is precisely what we did and what we continued to do, and which Mr. Lucking accepted on his last transaction, some fifteen years before this case was filed, or longer—somewhere in there; the statute of limitations had run on him [50] two or three times, if there was anything to his contention to start with.

He took 20 acres plus, I think, or minus, and got 20 shares of stock, which he apparently was content with, which he accepted water service on over a

period of years. Now he comes in and says that the amendment was void ab initio.

There is no allegation in the Complaint in what respect it was void. He said he didn't get any notice. Under the section of the Code referred to he didn't have to have any notice.

There was a section of the Code, and the history of that section showed at one time the newspapers had a bill in the Legislature, and the Legislature passed it, that you couldn't amend the Articles of Incorporation without publishing it in a newspaper for a specified period of time prior to the meeting. But that was amended and taken completely out of the Code, and when this amendment was adopted, it was adopted exactly according to that section, and there is nothing in their Complaint, your Honor, to show how, in what manner, or in what method or by what procedure we failed, refused or neglected to follow existing statutory law at that time.

I have checked the Corporation Code right down to date, and there is still no provision in that Code requiring notice to any stockholder of an intent to amend the Articles, if the meeting is held at a regular stated meeting of the corporation, which the amendment attached to his Complaint shows on its face was done. [51]

Now, that is a matter of law, your Honor. It is a matter of substantive law.

He complains of the amendment because he says it gives us control. It doesn't give us control at all. If we sell that stock to qualified users within the

service area, we are not particularly concerned with control here. It is not our thought at all.

We should like to get rid of this stock to bona fide users within the area. Valley Company has no intent to harm or injure Mr. Lucking. But we do contend that under the Constitution of this State, and even under the Federal Constitution we cannot be deprived of our property, a valuable piece of property, and the assets of the Mutual have steadily risen in value over the years. We have a very splendid well, a fine producer, and all of which cost the stockholders nothing.

Maybe this was a great mistake that the Valley made, your Honor. Maybe we shouldn't have done it. Maybe we did an act that Mr. Lucking could complain of, but when we had to drill a well up there and we needed $15,000.00, we didn't assess Mr. Lucking or any other stockholder. The Valley Company let the Water Company have the money to drill it. It is a wonderful well; practically a million gallons a day. We are using approximately 2 per cent of the available supply in that area.

Mr. Lucking is very fearful some of these farmers —he [52] mentioned these farmers, yes. I know something about those farmers. They open up their head gates and run the water 24 hours a day for two or three weeks. They use more water in one week than the Mutual Company would use in three months.

Yes, they are very much up in arms because they think that their little mutual or some other instru-

mentality up there purchasing water should be choked off.

In other words, these people over the years, some 35 years, their homes and residences, many homes much more expensive than Mr. Lucking's, who have been getting good service, and well satisfied with the situation, have never complained orally or in writing at any time.

Now, getting back to the proposition that he contends for, that because the Valley Company owns a majority of stock in the Water Company, that that on its face seems to be some foul situation, smacking of unfairness, injustice and inequity.

I only have to refer him to some of the corporations over the country, like the Bell Telephone Company, United States Steel Company, and I could refer to a thousand of them, all of whom have totally-owned subsidiaries. But there is nothing legally wrong about it.

The Valley Company had as much right to take that stock from Mr. Libbey as somebody has to go down here and buy a share of stock in the United States Steel. Unless he can [53] show your Honor that we have done something unjust, unfair, inequitable, detrimental to him, detrimental to the Water Company, we are prepared to show your Honor that we have watched that company with meticulous care over the years. We have never yet had an assessment.

Now, he complains about water, about rates for water, over here at the golf club. Well, your Honor knows that every utility and every water company,

whether it be mutual or otherwise, has a sliding scale of rates.

If you consume more electricity up to a certain point, the Edison Company will give you a lower rate. If you take more gas in a certain period of time, the gas company is going to give you a rate.

If some water company can sell a man a million gallons of water and it is available for use, they will give him a better rate than a man that uses a hundred gallons a day.

Now, that is exactly what we did, and that is exactly what Mr. Lucking is complaining about in the so-called country club case.

The testimony will show that we have a sliding scale of rates, based upon the amount of use, the more water you use the lower your rate. That is common every-day practice for mutuals, public utilities and all kinds and types of companies. It is sanctioned by custom. It is sanctioned by economics and it is sanctioned by logic and reason. [54]

The Court: Do you sell water to anyone who is not a shareholder?

Mr. Hollingsworth: No, sir, we never have. We sell no water to anybody that doesn't own stock in the Mutual Water Company. [55]

He can own all the stock he wants to, and then he can't get water unless he has land in the service area. That is it, your Honor. That is right in the articles and bylaws.

You could go up there and you could buy all of the water stock from the Valley Company, and you would not be entitled to a drop of water, and it

would not help you out a bit under the Articles of Incorporation unless you owned land. That is expressly so provided, that you have to have both land and stock in the service area.

The Court: You contend that it is the service area which defines the boundary, and not the original Libbey interests?

Mr. Hollingsworth: Why, your Honor, they have no more to do with it. There is nothing in the record, your Honor, there is nothing in the history of the company, there is nothing in our operations over the years past to show that we were only furnishing water to owners of the Libbey property.

That is absolutely not the case. The Articles expressly prohibit it. There is nothing in those Articles describing the Libbey property to the exclusion of all other property. If that was the proposition, all Mr. Libbey had to do was to describe his 640 acres, and say that only shares of stock shall go on that land—period.

But, as I stated to your Honor, the testimony will show [56] that the very first users of water got stock, who were not owners of Libbey land.

We never started out to predicate an argument here for Mr. Lucking that after we went along for 25 years, we only gave stock to Libbey owners, and only gave them water. That is not true, because at the very beginning, at the inception, the first people that got stock were non-Libbey owners.

Now, as to Mr. Lucking, I don't know where he ever got the idea after he read the Articles of Incorporation, and after he read the bylaws, and after

he has been through our office, your Honor, with a fine-tooth comb, and he has had access to it and has looked it up, and he has had the privilege of doing it. We never at any time held anything back from him. It is an open book, and yet he says he is not bound by the Articles of Incorporation because he didn't know about this situation when he bought his stock.

I will have to refer him to the fundamental law on the subject, that when he bought stock in a corporation, he took it with notice and knowledge of the Articles and the bylaws.

And he alleges no fraud or concealment, no misrepresentations of any kind, to the effect that his lands were Libbey lands and that nobody else could get water but Libbey owners.

Now, your Honor, that is our position in this case. It is our contention that this is nothing but an attempt on the part of Mr. Lucking to take over the Water Company by this [57] method. He wants you to cancel in excess of 1000 shares of valuable stock owned by the Valley Company. He will then be the largest stockholder left, with 151 shares. There is no other stockholder that owns as many shares as Mr. Lucking. There are some that own—I will take that back, your Honor. I want to be corrected on that. For a long time he was the largest stockholder, and I still think he is the second largest stockholder.

I think the Country Club has 200 acres and 200 shares. I may be mistaken, but I do not think so.

I think that Mr. Lucking owns, and he is the second largest holder, he and his son put together.

Now, he talks about that Country Club. We turned it over to the Army and Navy during the war. They went in there with bulldozers, and they put in pipelines. They had to have water for men, they had to have water for this, and water for that, and we let them have it. That was during the period of time when we used a lot of water. Yes, they got a lot of water from us over there, but it was a situation where this country was in war, and we did let them go in and use large amounts of water.

The Court: I don't gather Mr. Lucking is complaining about that.

Mr. Hollingsworth: He is complaining about the amount of water used at the Country Club. He says that in his [58] second cause of action, and he has given your Honor figures on a percentage basis.

The Court: He gives me the impression that he is alleging that the water supply is short.

Mr. Hollingsworth: Yes, your Honor, and I am coming to that.

The water supply is not short. That we deny, and we are prepared to prove by qualified competent experts. If it were short, your Honor, that is no basis for confiscating our property. If there is a shortage of water up there, we are all going to be treated alike.

If it gets to the point where somebody can only use 500 gallons a day, why, that will be it. It has never got to that point, your Honor. We have never rationed water. It has never been done in the whole

history of the concern, that we ever rationed domestic water to anybody. Our wells have never broke suction. Our wells have continuously increased since 1951.

Certainly, all Southern California in 1951 was faced with a condition on account of a dry year, where there was a water shortage. That is nothing new in Southern California. That is true. But it is the first time I have ever heard that property can be cancelled or taken away under a method or procedure of this type.

Now, that is our position in the matter, your [59] Honor. So far as a water shortage is concerned, Mr. Lucking has never been shorted on water. He has had water all along. He may be worried about it, yes, but that is purely surmise and conjecture.

I can readily understand where somebody might be worried about how much rainfall we are going to have in 1956, 1957 or 1958. Mr. Lucking, Jr., says water comes in cycles. Referring to that, if it comes in cycles, we have gone through a long dry cycle, and the probabilities are and the chances are very good that we may be entering into a wet cycle, but whether we are or whether we aren't, the Court is faced with the fact and not with a period.

Your Honor is faced with existing conditions, as they now are, and as they have been since the filing of this complaint.

Now, I have taken up more time than I intended to.

The Court: You can take up more, if you want to.

Mr. Hollingsworth: No, your Honor.

The Court: I am trying to get a grasp of the issues here, and I am glad to hear what you have to say on them. If you have finished, why, I will content myself with re-reading the file.

Mr. Hollingsworth: I can conceive that this case could be readily tried in maybe not to exceed a day or two. The matters of law which I have referred to all appear upon the [60] face of the complaint. That is a matter of substantive law, your Honor. You don't need any testimony on that.

The Court: Well, many of them might be raised by a motion of one kind or another, or an objection to evidence.

Mr. Hollingsworth: To testimony, yes. That is what I intend to do. I intend to object to testimony on the ground that these portions of the complaint do not state a claim or cause of action. I intend to do that, but I want to point out to your Honor that you have an expeditious way of disposing of this case absolutely on cold law, because if it be the law that——

The Court: Equity comes in there, too, doesn't it?

Mr. Hollingsworth: Equity comes in.

The Court: And equity is not supposed to be cold.

Mr. Hollingsworth: That is right. Equity follows the law. That is true. Equity can't change the Articles of Incorporation, your Honor. Equity can't say that we can only furnish water to Libbey lands. Equity can't say that the amendment to the Articles is a void amendment.

The Court: And this is not a condemnation proceeding.

Mr. Hollingsworth: No, definitely not. It is a confiscation proceeding, not a condemnation. That is, your Honor, if you condemn a man's land, you at least have to pay him for it. But they want to confiscate over 1,000 shares of water stock that the Valley Company owns, just wipe it out. Of course, we can't stand for that. [61] That is a little bit richer cream than generally rises on the milk of human kindness.

We have been kind and considerate enough not to levy any assessments against Mr. Lucking for his water service, and we have that very fine well that has been developed up there for him and for the other stockholders, but we still think we are not going to let him confiscate our stock. [62]

* * *

May 31, 1955—10:10 A.M.

* * *

Mr. Hollingsworth: I might be able to save time at this particular point, may it please the Court, if I object at this time, which I do, to any testimony in this case upon the ground that it fails to state a complaint on behalf of this plaintiff as against the defendants, or either of them. In other words, that the complaint fails to state a cause of action as against the defendant, The Valley Company, the Ohio Corporation, or the Ojai Mutual Water Company, the California Corporation.

The reasons for it appear upon the face of the

complaint itself, because having adopted and pleaded as one of the exhibits in the case the Articles of Incorporation of the Ojai Mutual Water Company, it plainly and clearly appears on the face of the pleading itself that the Mutual Water Company is not restricted or confined in any way under [70] the Articles of Incorporation to furnish water only to so-called Libbey landowners, or those acquiring title from the Valley Company.

Secondly, that the amendment to the Articles of Incorporation—the pleading on its face—shows that there was a valid amendment to the articles, and, under the law, as it existed in 1935, of which the court will have to take judicial notice, there was no requirement in the Code to the effect that the plaintiff here had to have any notice of an amendment of the Articles of Incorporation increasing the requirement for water users from one share, that is, to one share per acre rather than one share per quarter acre.

Furthermore, that the complaint on its face shows that it is barred by the statute of limitations, for over seven years, apparently, have gone past from the time that Mr. Lucking took title to his property, or, over five years I would say from the time he took title to his last parcel of property, where he obtained one share per acre at that time, and continued to receive water for that property on that basis, and we feel that the complaint does not state the facts.

We made a preliminary motion before the court, it is true, to dismiss upon the ground it did not state a claim. [71]

The Court: Didn't you make two, one to Judge Westover and one to me?

Mr. Hollingsworth: No, it was never before Judge Westover, your Honor. The only, this is the only court that—we never appeared before Judge Westover.

The Court: I noticed that a motion had noticed there, and then the next thing that came along was an amended complaint.

Mr. Hollingsworth: Yes, and then we renewed—what happened, as I recollect, your Honor, was that the case was originally assigned to Judge Westover and we had filed a notice of motion with him, and before it could be heard I think your Honor assumed your duties as one of the judges of this court, and then the next thing to my recollection, according to the file, we received a notice that the entire matter had been transferred to this court and it has been here ever since.

We never made any appearance in Judge Westover's court. That is your recollection, isn't it?

Mr. Lucking, Jr.: That is correct, Mr. Hollingsworth, there was never a motion before Judge Westover.

Mr. Hollingsworth: There was never a motion.

The Court: I have, of course, lived with the case much longer now than I had at the time that the motion was before me the first time. When it was before me the first time I [72] was under that difficulty which is common to new judges of the court, where they get a plethora of cases, and you have like motions in some fifteen or twenty cases at a

time. And it just isn't physically possible to give them the attention you can after you have gotten into the groove a little and have only a normal number of cases.

I have gone through the files in both these cases in great detail and read the authorities that have been cited. I don't know now how I will rule, but I think the making of the motion at this time is appropriate, if for no other purpose it perhaps will clarify and limit our factual issues, define the areas of testimony which will be later on admitted.

Mr. Hollingsworth: I think the matter can be greatly shortened whichever way your Honor rules here. It is purely an issue of law, your Honor.

The Court: It seems that these pleadings are what we used to call speaking complaints. They don't just limit themselves to the ultimate facts, but they spell out pretty well a lot of the evidentiary matter. They tell the story in much more detail than is necessary in order to state a claim under Rule 8, if a claim can be stated in these cases.

So do you want to expand on your motion, Mr. Hollingsworth? I understand that you are making them as to both cases? [73]

Mr. Hollingsworth: Oh, yes. Yes, in both cases, your Honor, that is true. I should have prefaced my remarks to that effect, on both cases, because the second case, all they claim is that we charge one consumer more than another, without any statement of fact at all as to the amount or the extent of the use of water between one particular consumer and another class of consumers, and nothing in the

second complaint at all which alleges that the consumer, that he complains of the Ojai Country Club, so to speak, is on a different basis than other consumers in the same category, taking the same amount of water.

He just claims we undercharged them, which is a pure conclusion on his part. But there are no facts showing preference or discrimination in favor of that particular consumer, as against other consumers, because he doesn't state in his Complaint what our schedule of rates are and how much we charge a consumer that only takes so many cubic feet of water compared to another consumer who may take a substantially larger amount of water.

And that Complaint, we feel, doesn't state a claim as against either defendant here, and it is just simply a matter of law for the court to determine from an examination of the pleading itself whether or not you want to take testimony here concerning classes or categories of consumers, relative to water charges made by the Valley Company for [74] water actually serviced.

That, we feel, is purely a matter of law and the schedule is entirely contrary to the way Mr. Lucking has it set up in his Complaint, but that would not go to the question as to whether or not it states a claim. But on its face it doesn't show, as I have already said, that we have discriminated in favor of the Ojai Country Club as against other consumers in the same category, if there by any in that category.

Now, I assume the same practice here obtains that obtains in the state court, that it isn't necessary to make an objection every time a question is asked here, but that it may be understood that all the testimony on behalf of the plaintiff is going in here subject to our motion to dismiss and our objection to the taking of testimony upon the ground neither complaint here states a claim under the Rule 8, or, as we would say in the state court, states a cause of action against either one of these defendants.

I do sincerely feel, your Honor, that the issues here can be very sharply limited, in view of the actual pleadings themselves. Your Honor can at your leisure determine whether or not the amendment to the Articles was valid. It is purely a question of law. Your Honor can do the same thing respecting the powers granted to the Ojai Mutual Water Company, under its Articles of Incorporation. In other words, [75] are we restricted or confined to water service to those who Mr. Lucking claims must have acquired title to their lands through Libbey? The Articles themselves completely negative that contention on his part.

Now, whether the amendment is a valid amendment or not is purely a question of law. The amendment is pleaded. All he says to invalidate it is that he had no notice of it. That is our position in the matter, your Honor.

The Court: Do you want to argue it?

Mr. Lucking, Jr.: Yes, your Honor, I certainly do. If I seem to stutter around a bit, your Honor,

it is because this motion was unexpected, since I thought we had already had this out.

The Court: Well, we did have extensive argument on it, as I recall it, or at least we had arguments that stuck in my memory and I from time to time get out the file and do a little reading on it when your motion to dismiss was originally made, but it is proper new motion at the outset of the trial.

Mr. Lucking, Jr.: Yes, your Honor, I am aware that counsel——

The Court: So do you want to go ahead or shall I take a brief recess while you get organized for your remarks here? [76]

Mr. Lucking: Your Honor, I think we can proceed at this time, if the court please.

Now, Counsel has reiterated the statement made by him in the opening statement with regard to this requirement of notice.

He said that he has examined the Corporation Code from start to finish, and he has found even up to date no requirement of notice for the passage of this so-called 1935 amendment, as attempted.

Now, I don't honestly know how counsel could have missed it, particularly since both on oral argument three years ago and in my brief I set forth and refer to California Corporations Code Section 2201.

Now I don't happen to have here at the moment the up-to-date Corporations Code. However——

The Court: That is the one that was in force at the time?

Mr. Lucking, Jr.: That is correct, your Honor. However, a cursory glance at the present Corpora-

tions Code shows that Section 2201 of that Code was based upon the former Section 312 of the Civil Code.

Now, in view of counsel's opening statement, I brought along a copy of the Civil Code which I acquired, dated 1931, and pasted in it is what I assume to be an amendment to Section 312 of the Corporations Code, at the bottom of which it [77] states:

> "(In effect 90 days from and after May 22, 1943, Section 1(a) Article IV Constitution, Statutes 1933, Chapter 533.)"

and then in the lower right is the statement, "Civil Code, 1933."

Now, your Honor, I am not aware of any change in that, or any substantial change in that, or in the language to which we refer, from that date on until now. I did have a 1937 Code, checked that, and it is still there.

I see no record in any of the Annotations of its having been changed, and it exists today in substantially the same language as it did in 1933, when it was enacted, two years, or approximately so, prior to this attempted 1935 amendment.

I would like to quote this language to the court, and to read it into the record, quoting from Section 312 of the Civil Code of the State of California:

"An annual meeting of shareholders shall be held at 11:00 o'clock in the morning on the first Tuesday of April in each year at the principal office of the Corporation, unless a different time or place be provided in the bylaws. At such meetings directors

shall be elected, reports of affairs of the Corporation shall be considered, and any other business may be transacted, which [78] is even within the powers of the shareholders, provided that written notice of the general nature of the business or proposal shall be given as in case of a special meeting, even though notice of regular or annual meetings be otherwise dispensed with, before action may be taken at such meeting on——"

To shorten time now I will skip to subsection (4)——

"(4) A proposal to amend the articles except to extend the term of the corporate existence."

Counsel, do you want to look at this?

Mr. Hollingsworth: I have the Section 312, 1935 Code, and your amendment was in March of 1935.

Mr. Lucking, Jr.: Is there any difference in 1935 from the law as it was when I read it?

Mr. Hollingsworth: I think so, because that required publication in newspapers, didn't it?

Mr. Lucking, Jr.: No, sir, it did not. I quoted it. You can look at it, if you want to.

Mr. Hollingsworth: I am not disputing your word. What Code do you have there—1931?

Mr. Lucking, Jr.: 1931. Does the court wish to examine this?

(The volume was handed to the court.)

Mr. Lucking, Jr.: If your Honor please, we could get [79] the Statutes, the Sections of the Code, the big volume, if there is any question about it. Counsel

says he has the 1935 Code there. Is Section 312 as I quoted it in that, counsel?

Mr. Hollingsworth: Well, it does not have the amendment you have to it there. You have a 1935 amendment to the 1931 Code.

Mr. Lucking, Jr.: I have a 1933 amendment to the 1931 Code.

Mr. Hollingsworth: Well, it is the 1935 Code that applies.

Mr. Lucking, Jr.: The legislative history of that, according to this, your Honor, states, "Added by statute 1931, page 1778."

Counsel is calling this a 1935 Code, but it says 1933 on the outside of it.

Mr. Hollingsworth: I mean 1933.

Mr. Lucking, Jr.: Well, there is a difference, Mr. Hollingsworth. There is a big difference.

Mr. Hollingsworth: All right.

Mr. Lucking, Jr.: I don't think that was brought up to date. If your Honor has any question about that, I would be very happy to get the Codes, and we could go right into the legislative history of it, but I had checked the 1937 Code, and it is there, and it is in Section 2201 of the Corporations [80] Code, to which I referred.

The Court: Well, let's have Mr. Hollingsworth's view on it now.

Mr. Hollingsworth: I have it here, your Honor, and I will read it into the record, if I may.

This is a chronological history of the situation. The 1933 Code applies. I wrote the Secretary of State to find out if there was any special session of

the Legislature following the adoption of the 1933 Code, and there was none.

The amendment to the articles in this case took place prior to the effective date of the 1935 Code, so the 1933 Code is the one that governs the situation.

Now, here it is: On the 4th of March, 1935, at a regular meeting of the board of directors of the Ojai Mutual Water Company, a resolution on the amendment—now, this was a regular meeting—a resolution on the amendment to the Articles of Incorporation was adopted. This was the regular annual meeting of the stockholders of the corporation.

1,740 shares of the 2,003 shares of stock issued and outstanding were duly represented at said [81] meeting.

The 1,740 share so represented unanimously adopted an amendment to the Articles of Incorporation respecting the per-share per-acre for the use of water as follows:

"Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof to which said water is to be delivered for use thereon situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such man-

ner as the bylaws of the company may determine. Mere ownership of stock in said company or of land situated within the above-described limits shall not entitle the stockholder to any water whatsoever unless he and his land shall otherwise be eligible."

The amendment to the Articles of Incorporation was filed in the Office of the Secretary of State on September 27, 1935, endorsed by Frank C. Jordan, by Charles J. Hagerty, Deputy. [82]

The certificate of the Secretary of State Frank C. Jordan, by Charles J. Hagerty, Deputy, was issued on the 28th day of September, 1935, and said certificate was filed in the Office of the County Clerk of the County of Ventura, on the 30th day of September, 1935.

The date of the amendment in question is governed by the provisions of Section 362(a) of the 1933 amendment to the Civil Code. The 1935 Legislature adjourned on the 16th day of June, 1935. Laws enacted by it other than emergency measures would not go into effect until September 16, 1935, under constitutional provisions. The legislative session prior to 1935 was the 1933 session. The 1933 Legislature amended Sections 362, 362(a), and 362(b) on the 24th day of March, 1933. These particular sections of the Civil Code were in effect at the time of the amendment of the Articles in the instant case.

Section 362 of the Civil Code, 1933, is the general provision specifying the respects in which the Articles of Incorporation may be amended.

Section 362(a) of the same Code sets forth in general the proceedings necessary to amend the Articles of Incorporation. If the purpose of an amendment under Section 362(a) is to change the preferences or restrictions of any class of stock or shares authorized by the corporation, such amendment must be approved by resolution of the board of directors [83] and by consent or authorization of at least two-thirds of the outstanding shares of the corporation. The resolution or consent of the shareholders approving any amendment shall establish the wording of the amendment or amended Articles by providing that the Articles shall be amended as read and therein set forth in full.

Section 362(b) of the same Code provides that upon the adoption of any amendment to the Articles, stating the manner of its adoption, shall be filed as follows: In case of an amendment adopted by the incorporators, the certificate shall state that the signers thereof constitute at least two-thirds of the incorporators. The certificate shall be signed by at least two-thirds of the incorporators and shall be verified by the oath of the signer.

In case of an amendment adopted by the shareholders or by the directors the certificate shall be signed by the president, or vice president; shall set forth a copy of the resolution of the board of directors; time and place of the meeting of the shareholders and a copy of the resolution adopted thereat and the total vote by which the amendment was approved.

I might intersperse at this time, that all of which appears to have been done. Now going on.

This is the method employed by the Mutual Water Company in adopting the amendment to the Articles on March 4, 1935. [84]

This is the significant thing of the whole thing: Section 362(b) further provides that the certificate shall be submitted to the Secretary of State, who shall file the same and put an endorsement of filing thereon if he finds that it shows a compliance with the provisions of the law. Thereupon, the Articles of Incorporation shall be deemed amended in accordance with such certificate and a copy of such certificate certified by the Secretary of State shall be prima facie evidence of the performance of the conditions necessary to the adoption of such amendment.

The Court: You, as I understand it now, Mr. Hollingsworth, are now conceding that notice was necessary, as Mr. Lucking insists, but that the certificate of the Secretary of State is evidence that notice was given.

Mr. Hollingsworth: Precisely, your Honor, because there is an affidavit on file in this case. We had a barnful of records and they were burned and destroyed.

We went to the former attorney of the Ojai Mutual Water Company—set that forth in our affidavit—and tried to check back the old records relative to the amendment, but he did not have them. His files had been destroyed, some fifteen years had elapsed and he had destroyed all of his

old files. We undoubtedly had these records in the old warehouse up there, which burned and were destroyed, but on its face, under Section 362(b) the Secretary of State, [85] when he filed those Articles, it was part of his official duty to determine if the necessary procedure had been done, had been gone through with, and when he filed them it became prima facie evidence, and Mr. Lucking furthermore, under another defense we have pleaded here, waited for over 15 years, which I think is on its face—it shows laches on his part.

The Court: But time will never make a void act valid.

Mr. Hollingsworth: Oh, no. That is very true, your Honor, but we contend that the certificate filed by the Secretary of State, approving the amendment to the Articles, is evidence before this court that all notices required by law had been given.

The Court: Well, if we can take that as evidence, can't we take evidence, other evidence you might wish to offer or evidence that Mr. Lucking might wish to offer on the same subject?

Mr. Hollingsworth: To the effect that the corporation gave no notice?

The Court: Yes.

Mr. Hollingsworth: Yes, that can be done.

The Court: Then your motion to exclude the taking of evidence still, I take it, admits to the taking of evidence on this particular subject. You are not asking me to foreclose the taking of evidence that notice was not given? [86]

Mr. Hollingsworth: No, no, definitely not. If it is competent evidence, no.

If he can show, if he can produce any person, any member or officer, or board of director, or any resolution contained in the minutes, or anything of that kind, to the effect we did not give this notice, that would be competent evidence here. But all he alleges in his Complaint is that he personally received no notice. That isn't evidence of the fact that we didn't conform. That is our contention. That is his only contention, is that he never got notice, despite the fact he bought land subsequent to that time and took one share per acre, when he already had other land that he had been given shares under the old amendment.

The Court: Well, let's proceed and take evidence on this limited subject. Then we will proceed to the next order of evidence.

Mr. Lucking, Jr.: Your Honor please—are you done, counsel?

Mr. Hollingsworth: Yes.

Mr. Lucking, Jr.: His motion was too inclusive. We are just going to go through this again. I think—let's get this thing out here.

The Court: Are you addressing yourself to something besides this matter of the notice now?

Mr. Lucking, Jr.: Excuse me a minute, please, your [87] Honor.

I would at this time like to know whether your Honor wants to consider Mr. Hollingsworth's entire motion and your Honor wants more argument on it, whether, for the purposes of his motion, Mr.

Hollingsworth is considering that all the facts well pleaded are true in the Complaint. In other words, what is our status right at this point? The motion was quite inclusive.

The Court: You want to state the motion as you wish the court to consider it now, Mr. Hollingsworth?

Mr. Hollingsworth: Yes, your Honor. Well, I made an objection to receiving any testimony here upon the ground—in both cases—upon the ground neither complaint in either case states a cause of action against the defendants or either of them, on the ground that the Articles of Incorporation speak for themselves and have been pleaded, except to the effect we have 2,765 acres of land in our service area and we are not limited in the servicing of water to the so-called Libbey lands.

Secondly, that the amendment, so-called alleged invalidity of the amendment to the Articles of Incorporation, shows on the face of the Complaint itself it was a valid amendment.

Furthermore, that the service of water to the consumer in the second case, claiming a preference or discrimination, in his favor as against other water users, does not state a [88] claim or cause against the defendant or either of them and upon that ground and for those reasons, that no testimony be received here in this case on behalf of the plaintiffs, and further renewing the first motion to dismiss here upon the ground that the Complaint does not state a claim under Rule 8 either against the Valley Company or the Ojai Mutual Water Com-

pany in either or both cases. That is as short as I could make it.

Mr. Lucking, Jr.: I would like to inquire, counsel, do you admit that all the facts well pleaded within the scope of your motion are true?

Mr. Hollingsworth: I don't think the facts were well pleaded, Mr. Lucking, because——

Mr. Lucking, Jr.: That is a matter of law, Mr. Hollingsworth. I am asking what you mean by your motion.

Mr. Hollingsworth: Only as to those allegations in the Complaint that are well pleaded, your Honor, and that is as far as I will go. I don't think there is any pleading properly before the court relative to the invalidity of this motion. The presumption is to the contrary.

The Court: Well, there is a presumption that the Articles were properly amended. Doesn't a presumption or, at least, an inference arise from the fact that a stockholder of record did not receive notice?

Mr. Hollingsworth: I don't think so, your Honor, not [89] under that provision.

The Court: Don't the two come in conflict?

Mr. Hollingsworth: I don't think so.

The Court: It is presumed that the regular course of mailing——

Mr. Hollingsworth: That is right.

The Court: ——is successful.

Mr. Hollingsworth: It is presumed that the regular course of business has been followed by the corporation and it is presumed that the corporation

acted according to law. That is a statutory presumption. The mere fact he didn't receive a letter or, any other stockholder, some notice in the form of a letter wouldn't, in my opinion, justify a court in holding that the notice required, if any, to amend the Articles, had not been given, when the Secretary of State had put his stamp of approval on the amendment and had filed it under the provisions of Section 362(b).

The Court: You are contending that the duty of the corporation was complete when it gave a notice, irrespective of whether a particular shareholder received it or not. [90]

Mr. Hollingsworth: Correct; correct. No question about that.

But another significant fact in the case which cannot be overlooked, and which appears on the face of the complaint is that he took under the four share provision per acre, and then bought land at a later date, and took under the one share per acre provision. He is estopped, according to our pleadings, to question it.

The Court: According to his pleadings?

Mr. Hollingsworth: According to our defense. We, at least, set up a defense of estoppel and laches, and according to the complaint, on its face he stands estopped, because he admits in his complaint that he took and bought 20 acres of land, and for which he got one share per acre, of which he is now complaining, and for years accepted water on that basis.

The Court: Then the court understands that you

are presently urging a motion in each case to exclude the taking of any evidence?

Mr. Hollingsworth: Correct, your Honor.

The Court: And for the court to decide this case as a matter of law?

Mr. Hollingsworth: As a matter of law. That is exactly it.

The Court: Upon the pleadings? [91]

Mr. Hollingsworth: Yes. Your Honor has correctly stated it.

Mr. Lucking, Jr.: Do I understand from that, your Honor, that counsel is admitting all facts that——

The Court: For the purpose of the motion.

Mr. Lucking, Jr.: For the purpose of the motion?

The Court: For the purpose of the motion he admits that all facts are correctly stated.

Mr. Lucking, Jr.: Very well. Does the court desire more argument on it?

The Court: I would like some more. I don't——

Mr. Lucking, Jr.: All right, your Honor. If the court would like some more, I would be very happy to help in the matter.

The Court: Now, counsel is here from San Francisco, and he has another matter pending. I take it your argument will be somewhat extended, so, Mr. Gallagher, would you like to come back in chambers for a moment?

Mr. Gallagher: I would appreciate it, your Honor.

The Court: Then we will take a recess in this case.

(A short recess.)

The Court: Mr. Lucking——

Mr. Lucking, Jr.: Yes, your Honor.

The Court: ——I have decided to deny this motion in so far as it pertains to the question of whether the articles of [92] incorporation were properly amended. As to the other parts of the motion, my mind is still open.

Mr. Lucking, Jr.: All right.

The Court: He wants to limit you to that issue. In fact, he wants to limit you to your pleadings, but as to that issue we are going to take evidence.

Mr. Lucking, Jr.: Your Honor, I have been trying to get this out, or trying to make a statement on this for some time. It has been repeatedly said, both in the opening statement and several times today, that we allege only that we received no notice.

Now, at the bottom of page 5 of the first amended complaint—I just have to get this off my chest, because it incenses me—the last paragraph on page 5, beginning at line 30 of the first amended complaint states:

"That of the stockholders meeting of said defendant Ojai Mutual Water Company at which this Amendment, Exhibit 'B,' was authorized, plaintiff received no notice of said intended Amendment to said Articles of Incorporation as required by law; and upon information, no such notice of said intended Amendment was given as required by law." [93]

In other words, there is an allegation that it wasn't given. I just had to get that off my chest, your Honor.

Now, counsel says that on the face of the complaint, since we pleaded the articles of incorporation, that we are bound by the articles.

The articles, being nothing more than a part of the complaint by reference, and saying that these are the articles as they appeared, now or at that time, is obviously and clearly modified by the later and different allegations in the complaint. In other words, the articles as pleaded, merely state that, now, here is what the articles say, and here is what we say.

Now, because of that, and because of the fact that your Honor has to read the complaint in its entirety, to show how unfounded the defendants' motion is on that ground, your Honor, we sincerely urge that it is absolutely unfounded.

Now, as to the statute of limitations, and the waiver, and so on:

In the first place, of course, being a class plaintiff, this plaintiff himself cannot waive the rights of any other stockholders. However, in addition to that——

The Court: I wonder if he can properly be a class plaintiff in a diversity case. The only basis for the jurisdiction of this court is diversity of citizenship, and most of the stockholders would be expected to be citizens of [94] California, because the owning of stock is incident, or usually incident to the holding of land in a residential community,

and most of it is residential land. Now, with a California corporation, and the shareholders being largely California citizens, can you have him appear in a class suit in this court?

Mr. Lucking, Jr.: I think you can, your Honor, but we haven't any cases at the moment on it.

I wanted to bring up this waiver matter, at any rate. It is completely unfounded, and the case of Copeland v. Fairland Land, 165 Cal. 148, which has been cited previously for other grounds and for other reasons, and which is in our briefs, states in effect, that a mere contract right may be barred by laches or the statute of limitations, but where, as in this case, and in the Copeland case, which is very close to this—but where, as above, there is a vested right, in other words, in this land and in the stock. That is a different matter, and the right may be lost only in the manner that other vested property rights may be lost.

The Court: That is just another form of the old rule that the mere lapse of time will not cure a void act?

Mr. Lucking, Jr.: Yes, your Honor, the mere lapse of time will not cure the void act, in so far as the void amendment is concerned.

Surely, that is one aspect of it. Another aspect of it [95] is that you cannot take away a person's vested property right merely because that person hasn't done something. You have to comply with the formalities of the law to take away such a right.

In other words, if I own a lot down the street, and I leave it there, and don't do anything, or say

anything about it, if I come back in 10 years, and if I have paid my taxes on it and complied with the requirements of the law, whatever they happen to be, that is still my property.

Now, on the matter of waiver, and so on, this Imperial Water Co. No. 5 v. Holabird, 197 Fed. 4, which we cited before, and which I submit to your Honor is a very important and interesting case, and which very closely parallels our case, here, states in part, and I am not quoting, that the settlers in that case could not be said to have voluntarily contracted with this defendant water company, since this was the only adequate supply of water. [96]

In other words, in the Holabird case the judge said, "These fellows are entitled to come in here and settle that land and when they make a contract with the water company, they are not waiving any rights. They are entitled to these certain rights, which equity gives them."

In the McDermont v. Anaheim Union Water Company case, 124 Cal. 112, previously cited, there is authority for saying that a void amendment is void ab initio. Notice of the lapse of time because of this amendment or any different stock distribution in the 1935 amendment was void, which, for the purposes of this motion, has been decided by your Honor; there can't be any waiver, either. In other words, it was void initially, if we act under it.

Now, I might make a comment about this second action. I hope it is to save time.

Counsel says there was a mere allegation of an undercharge and no specified rates. I think counsel,

in view of his previous motions in this case, would have been the first to move to strike any specification of rates as being merely evidentiary. We will put on proof, but the allegations are complete.

Furthermore, control and common ownership or ownership of the country club and so on have all been pleaded, anyway, so we have the basis there for equitable relief under all the cases. [97]

I don't think there can be any question about that. Since this matter of notice, your Honor, has been taken care of by your ruling on the motion, I don't see that anything further has to be mentioned on it, except that this Bogert case—I would like to cite that to you—does go to this whole aspect of the motion, and although it touches on the 1935 amendment, the effect of it still goes to the rest of the motion, too.

I told your Honor, pointed out in the opening statement, that even if there had have been notice as required by law this 1935 amendment, it was still void for that reason. I will just merely quote part of the language from this case of Southern Pacific Company v. Bogert, 250 United States Reports, 438, at page 491 and 492.

Mr. Hollingsworth: 250 what?

Mr. Lucking, Jr.: 250 United States Reports, 438.

"Equally unfounded—" this is from the headnotes "—is the contention that the Southern Pacific Company cannot be held liable because it was not guilty of fraud or mismanagement. The essential

of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits [98] which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a prorata distribution on equal terms among the old Houston Company shareholders."

It is that principle that we are talking about when we say that this notice, although it helps, is not necessary, in other words, a finding of this notice question in our favor. Thank you, your Honor. I think that that takes care of everything I have to say now.

The Court: To keep our record straight then, the motion is denied as to the question of the validity of the amendment to the Articles of Incorporation, and the court will keep it under submission as well as all other matters.

Mr. Hollingsworth: I would like to point out the other two—not the amendment, your Honor—you have expressed your position relative to the amendments.

On these other two matters here relative to setting up the exhibits, I have just checked the complaint. Those exhibits, the Articles of Incorporation, the amendment to the Articles of Incorporation, the deed, et cetera, that were issued to Mr. Lucking are all set forth as exhibits and they are part of the plaintiff's complaint.

Now, he wants the court now just to take the position, sort of cursorily to the effect it is just for information for the court. But he has made them a part of his pleading, [99] your Honor, and it becomes a matter of law as to what the Articles provide.

The Articles on their face expressly state that the stock is not appurtenant. There is no restriction on the service of any lands within the service area, as contended for by them. That is a matter of law set forth in their own complaint.

On the issue of the class action, we moved to dismiss here at one time upon the ground there had been no compliance with—I have the section there, I brought the Rules with me. I am not as familiar with those Rules as I should be, because I don't appear in the federal court often enough to call them off. But I know there is a rule there that requires that certain action be taken which wasn't taken, so far as the class plaintiffs category, the plaintiff tried to put himself in, is concerned, your Honor's further observation relative to his class action, I think, is very pertinent.

On the issues of appurtenants issue to the lands, on the issue who is entitled to water in the service area, it is purely a question of law governed by the Articles of Incorporation.

Now, if the amendment is invalid, that is one thing. But the other two are certainly questions of law and a great deal of time can be saved by this court by holding him to his pleading. That is our contention. [100]

The Court: Your motion to exclude the taking of evidence on those is held under submission.

Mr. Hollingsworth: Yes, I realize that, your Honor. I realize that.

The Court: I am only opening the door at the moment to evidence on this matter to the amendment to the Articles.

Mr. Lucking, Sr.: Would your Honor permit me to make one suggestion that may be helpful as we go along?

The Court: Yes.

Mr. Lucking, Sr.: Or would you prefer we call our first witness and get going? I don't care. I would like to make one suggestion. It will only take two minutes.

The Court: Go ahead, sir.

Mr. Lucking, Sr.: Because it probably is that I have lived with these matters——

Mr. Hollingsworth: Counsel, which case are you addressing yourself to? Is it the case you appear in propria persona or the other case?

Mr. Lucking, Sr.: Have it your own way. The second case, for the purpose of your suggestion.

Mr. Hollingsworth: I wanted to be sure.

Mr. Lucking, Sr.: I don't suppose the court would deny me the right to act as of counsel even in the first case, and be heard. I don't think so. If I am not too wrong in my statements, that is. [101]

The Court: I haven't been called upon to rule on that question.

Mr. Lucking, Sr.: What I want to suggest to

the court is this:—And for the benefit of counsel, it will be very brief—there is no use my reading a mass of cases on the subject of almost universally that courts—as your Honor probably knows better than I do—have set aside any kind of a device engineered by the majority to perpetuate a control of a corporation which operates detrimentally to the minority or any part of the minority.

Mr. Hollingsworth: Of course, I want to object at this time. Mr. Lucking is merely taking up the time of the court here, addressing your Honor on a matter he doesn't appear as counsel in.

He is a party to that particular phase of that litigation and he is represented by his own son as his counsel. I object to the court's time being taken up at this time by Lucking on that phase of the case. [102]

The Court: Well, that is the first case, Mr. Lucking, in which you are not counsel. However, if your son wants to associate you as counsel, I will permit him to do so.

Mr. Lucking, Jr.: I will be very happy to, your Honor.

The Court: All right. Speak now as associate counsel in the first case.

Mr. Lucking, Sr.: I thought it would save the court's time and maybe counsel's time, that is all. That is all I want to say at this time, is that I think the issue that has been argued before your Honor, as to whether, for lack of certain formalities under the statute, this amendment is void or voidable or can be enforced is a pertinent issue, of

course, but it is not the greatest issue, as I see it.

The greatest issue is whether that amendment was enacted, not only as to previous stockholders to March, 1935, but as to all subsequent bona fide stockholders of the Water Company, as a mere device to enable this Valley Company to perpetuate its control after it had sold all its land and had ceased to have any real interest in the question.

Now, that is a subject which has not anything particularly to do with the lack of some legal requirement in the filing of the amendment, the making of the amendment or notice or lack of notice.

It is a device that the courts have uniformly set aside as intended to nullify in part or whole the rights of the [103] minority under the obvious advantage of everybody having a proper voice in order to vote for their own directors.

In other words, is it a mere device to perpetuate control in the interest of a certain segment of the Water Company stockholders, namely, the majority as it stands today? That is a vital question.

It is a question of fact, from all the facts, and I want one moment more because I am perfectly willing—and it will come up shortly—the Articles of the Association, which counsel refers to as a portion of the Complaint—those are the original Articles provided in 6, that "The amount of the capital stock of said corporation is $150,000.00 and the number of shares into which it is divided is 3,000 shares of par value of $50.00."

The pleadings show, the facts will show and all

the circumstances surrounding that day, and I think since practically the organization of the Water Company, the total issued and outstanding shares numbered 2,003. The unissued but authorized shares 997.

Now, as we progress it will appear very clearly, as a matter of simple arithmetic, that there was no necessity whatever from the point of view of this controlling stockholder, the Valley Company, to ever make this amendment, cutting back from four shares per acre to one share.

All they had to do, if they wanted a few more shares [104] to complete their object and their purpose, as the proofs will show, would be to issue under a resolution of the board three or four or five hundred of this unissued stock and give each of the stockholders his peremptory right to buy and the Valley Company would have had the right, as I remember it, of about, a number of shares outstanding when the amendment was made, I think what they held was five-sixths of the issued 2,003 shares. They therefore would have the peremptory right, if they wished to pay and buy that much stock, or 500 shares.

The other stockholders would have had a right to buy their proportion. They would never have had a right to buy stock which could be used later on to the detriment of the homeowners if the amount of water was insufficient, so that they could expand as they are talking about sometimes. Their original purpose of providing water for these lots and a few friends, they can't ever do that if it hurts the present stockholders, no matter how much

stock they have got. They didn't need any amendment or anything, just the simple issuance of some more of the stock and everybody would have had a right to buy their peremptory shares, and there wouldn't have been any necessity to change from four to one, which I claim was a device to perpetuate control and operates against the real interest of the minority owners and homeowners, which we have a perfect right and duty to ask the [105] court to cancel. That will come up later and we might as well have it before the court and counsel.

Mr. Hollingsworth: There is nothing in the Complaint that indicates any such issue here as stated by Mr. Lucking. He is trying to impress upon the court the fact that because we permitted one share of stock per acre of land and allege and set forth in our pleading we did it because of the fact that there was a progressive growth and development there in the area, and that water service was in demand and that we had to cut down on the shares of stock that had been issued at that time. [106]

Now, there is nothing in law or in equity that requires us to issue new stock. It was a matter of business judgment on the part of the directors of the corporation, and it is presumed that they act in good faith, and for the best interests of the entire corporation, as well as Mr. Lucking, and the assumption and the inference and conclusion on his part that everything that was done was unjustly, inequitably or fraudulently done will not be borne out.

We take the opposite position, and this is another

interjection and another factor not set forth in the pleadings here.

* * *

Mr. Lucking, Jr.: I would like to call Mr. C. J. Wilcox as an adverse witness, under the Federal Rules of Civil Procedure, Section 43(b), he being an officer and director of both defendant corporations.

Mr. Hollingsworth: Just come forward, Mr. Wilcox.

Mr. Lucking, Jr.: And I wish to question him as if [107] under cross-examination.

CHARLES JUSTUS WILCOX

called as an adverse witness under Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

The Clerk: Your name, sir?

The Witness: Charles J. Wilcox. Do you want the middle name? It is Justus, J-u-s-t-u-s.

Examination

By Mr. Lucking, Jr.:

Q. Mr. Wilcox, you are by your friends familiarly known as Justus, are you not? A. I am.

Q. Where do you reside, Mr. Wilcox?

A. Toledo, Ohio.

Q. How long have you lived there?

A. Since my birth, 76 years ago.

Q. Have you ever lived in the Ojai Valley?

(Testimony of Charles Justus Wilcox.)

A. No, only I am here for vacations occasionally.

Q. I see. Now, you are an officer of The Ojai Valley Company, are you not, Mr. Wilcox?

A. I am.

Q. What office do you hold, please?

A. I am president and treasurer.

Q. How long have you held that office, Mr. Wilcox? [108]

A. I have been treasurer since the incorporation of the company, and president since the death of Mr. Libbey in 1925.

Q. And you are also a director, are you not?

A. A director, yes, sir.

Q. How long have you been a director, please?

A. Since the incorporation of the company in 1922. That is the Ojai——

Q. The Ojai Valley Company?

A. The Ojai Valley Company, that's right.

Q. Now, as to the Ojai Mutual Water Company, you are also an officer of that, are you not, Mr. Wilcox? A. I am president and treasurer.

Q. Now, how long have you been treasurer of the Ojai Mutual Water Company?

A. From its incorporation, in 1920, I believe.

Q. And how long have you been president?

A. Since—I am not sure, but I think it was about a year after Mr. Libbey's death in 1925. I think there was a lapse there.

Q. You are also a director, are you not, of the Ojai Mutual Water Company? A. I am.

(Testimony of Charles Justus Wilcox.)

Q. How long have you been a director, please?

A. Since Mr. Libbey's death. [109]

Q. In 1925, about? A. Yes, sir.

Q. Now, you have been connected for many years with the Libbey family, have you not, and the Libbey estate?

A. Yes. I went into Mr. Libbey's employ as a personal secretary in 1908.

Q. And how long did you act in that capacity, Mr. Wilcox? A. Until his death.

Q. In 1925? A. Yes.

Q. And what position have you held since then with regard to the Libbey interests, if any?

A. On Mr. Libbey's death, I was one of the executors appointed and placed in management of the estate.

Q. Do you have any position now?

A. I am one of six trustees of the estate, and the manager.

Q. Now, you have been one of the trustees since shortly after Mr. Libbey's death; is that correct?

A. Yes, just as soon as the trusteeship was taken into the Probate Court, which was about two years, while the executorship was being completed.

Q. Now, where did the other five trustees reside, if you can remember? [110]

A. Where did they reside?

Where do they reside now?

A. They reside in Toledo.

Q. Have there from time to time been replacements of those six trustees?

(Testimony of Charles Justus Wilcox.)

A. Yes, as trustees died or left the trust, the remaining trustees elected the successors.

Q. Other than yourself, Mr. Wilcox, are there any trustees still acting as such, who were originally trustees in about 1927?

A. There is no other survivor.

Q. Now, do you trustees have an organization, as such? Do you elect a chairman, for example?

A. Yes, we have a chairman, secretary and treasurer.

Q. What office have you held, if any, of those?

A. I have been secretary and treasurer ever since the court okayed my appointment. We are all appointed by the will, named in the will originally.

Q. And you have acted in the capacity of secretary and treasurer ever since 1925, then; is that correct? A. I have.

Q. Is that correct?

A. I have. I am also manager of the estate.

Q. How long have you been manager?

A. Since the time of appointment; a month or two after [111] we were appointed.

Q. Is that a salaried job?

A. Yes, I receive a salary for my managerial work.

Q. What generally do your managerial duties consist of, Mr. Wilcox?

A. Oh, taking care of the real estate that was in the estate, and the securities, and the investment of the funds, and the paying out of authorized pur-

(Testimony of Charles Justus Wilcox.)

chases, authorized expenses, salaries—we have some salaries—and taxes, and court fees.

Q. How often do these trustees meet in a body?

A. It is irregular. As the demand is——

The Court: I don't think that it makes any difference on the issue we are trying now, how often they meet. We are trying the circumstances of the amendment to the articles of incorporation, or what has been claimed to be an amendment, and the giving of notice that it was to be considered at a meeting held way back in the '30s.

Mr. Hollingsworth: In 1935.

The Court: Yes.

Mr. Lucking, Jr.: If the court please, there are a great many other issues involved. I don't think the question which I asked is too vital. It all bears, however, on the extent to which Mr. Wilcox himself has been able to manage these corporations, and it goes to the question of who [112] controls the corporation.

Mr. Hollingsworth: Your Honor——

The Court: We are not trying that issue now.

Mr. Hollingsworth: That would not prove the validity or non-validity of the amendment, Your Honor. I am willing to stipulate that Mr. Wilcox is thoroughly familiar with the operation and management of The Ojai Valley Company, and has been since its organization, if that is what you are trying to prove.

Mr. Lucking, Jr.: Excuse me. Your Honor, I understood we had started the trial of this case as

(Testimony of Charles Justus Wilcox.)

a whole, not on the general issue of whether the amendment is valid, and——

The Court: I did not make myself clear, then. I reserved ruling on the motion to exclude evidence on all the other issues, and have denied it upon the issue having to do with the amendment.

Mr. Lucking, Jr.: Well, if Your Honor please——

The Court: We are taking evidence now on the matter of the amendment.

Mr. Lucking, Jr.: If Your Honor please, to be very honest with you, if we have to try that one narrow issue first, it will throw us badly out of stride. We have other witnesses we instructed not to appear until we called for them.

We understand, or I do, that the general rule of presenting [113] witnesses, Your Honor, in the presentation of the plaintiff's case, is to take each witness, develop his testimony fully, and then have done with him.

Now, we can, if Your Honor so rules, re-tailor the case and try this one narrow issue of whether or not the 1935 amendment was valid.

The Court: That is the issue we are trying now, and we will not try any other issues until we have that one tried.

Mr. Lucking, Jr.: Well, Your Honor——

The Court: I think there is a considerable question as to whether the other issues are entirely legal, and I want to have this one tried first, and then to rule.

(Testimony of Charles Justus Wilcox.)

Mr. Lucking, Jr.: Excuse me just a moment.

Q. (By Mr. Lucking, Jr.): Is it not a fact, Mr. Wilcox, that during your trusteeship the trustees in Toledo have for the most part left all matters regarding Ojai property, in other words, The Ojai Valley Company and the Ojai Mutual Water Company, up to you?

A. I don't think that is any item in this case. I think the evidence of operation of these companies is that they have been operated properly. [114]

Mr. Lucking, Jr.: Excuse me. Mr. Wilcox apparently didn't understand my question.

Miss Reporter, will you repeat it, please?

(The question was read.)

Mr. Hollingsworth: I assume the question is preliminary, Mr. Lucking.

Mr. Lucking, Jr.: This is on cross-examination, Mr. Hollingsworth.

Mr. Hollingsworth: I understand that. But the question is preliminary, isn't it, leading up to what was done relative to the amendment?

Mr. Lucking, Jr.: Yes.

Mr. Hollingsworth: All right.

The Court: Will you please answer that question?

The Witness: Well, I wouldn't swear that everything that has been done here has been under my direction, because many times I am not consulted in emergencies until the thing is cured, whatever it is.

(Testimony of Charles Justus Wilcox.)

The Court: What he wanted to know was whether the other people in the corporation back in Toledo have left things generally up to you.

The Witness: As a matter of fact, to a large extent they have, because I know the Ojai; I have been coming out here since 1915.

Q. (By Mr. Lucking, Jr.): Mr. Wilcox, if you were not [115] available, as you just pointed out, and the defects were cured, who cured that defect?

A. It was cured from here.

Mr. Hollingsworth: That is objected to. It is purely——

The Court: It is pretty general.

Mr. Hollingsworth: Yes. It is not specific.

The Witness: I don't know as I would even know that.

Mr. Hollingsworth: It doesn't have any relevancy to this particular issue.

The Court: Objection sustained.

The Witness: He hasn't asked me——

The Court: You just answer questions.

Mr. Hollingsworth: He sustained the objection, Mr. Wilcox.

The Witness: All right.

Q. (By Mr. Lucking, Jr.): If you were not available, Mr. Wilcox, and an emergency came up, as you testified to a few minutes ago, who in your organization had authority to act in your stead?

Mr. Hollingsworth: I object to putting into the question the word "emergency," Your Honor, as not having any bearing on the issues.

(Testimony of Charles Justus Wilcox.)

The Court: Objection sustained. We are taking a long time to get down to the limited issue that is to be tried here today. [116]

Q. (By Mr. Lucking, Jr.): Well, Mr. Wilcox, immediately prior to March of 1935 and during March of 1935, you were a director, were you not, of The Ojai Valley Company?

A. So far as I remember, I was.

Q. You were also a director of the Ojai Mutual Water Company, were you? A. I was.

Q. Who were the other directors, please?

A. The other directors of the Mutual Water Company were Mr. Harmon, Mr. Sinclair, I think at that time, Harry Sinclair, who is dead now.

Q. Now, who were the directors at that time of The Ojai Valley Company?

A. I don't believe I could answer that because there have been a lot of changes and I don't remember them.

They are the same directors ordinarily that the trustees are. As they change we changed the directors of the companies they are managing under the trusteeship.

Q. Now, how many shares of stock in March of 1935 in the Ojai Mutual Water Company were held by The Ojai Valley Company?

A. I couldn't answer the exact number, because I have to rely on my memory. I would have to see something to help me.

Mr. Lucking, Jr.: If Your Honor please, coun-

(Testimony of Charles Justus Wilcox.)

sel read a [117] figure which I did not take down a few minutes ago.

Can you supply that?

Mr. Hollingsworth: At the time of the amendment, Mr. Lucking, there were 1,704, I think it was —just a minute. 1,740 shares of the 2,003 shares at the March 4, 1935, meeting were represented. I don't know who owned them, but 1,740 shares out of the 2,003 shares were represented at that meeting, according to the minutes.

Q. (By Mr. Lucking, Jr.): Did you, Mr. Wilcox, have the power to vote those shares at that meeting? A. I did.

Q. I am referring to the 1,740 shares in Ojai Mutual Company.

A. No, sir, I didn't have—there were other owners that had taken stock previously. I don't know how many there were.

Q. Your attorney referred to 1,740 shares in Ojai Mutual Water Company, which were held at that time by The Ojai Valley Company——

Mr. Hollingsworth: No, I didn't say that. You misunderstood me. I said at the meeting, when the amendment was adopted, the minutes show that 1,740 of the outstanding shares of the corporation Water Company were represented at the meeting, but it doesn't say who owned the 1,740 shares.

I will stipulate they had a majority of the shares, but [118] just what that majority was I can't state at this time.

(Testimony of Charles Justus Wilcox.)

Mr. Lucking, Sr.: Do you have the minutes here?

Mr. Lucking, Jr.: If we could borrow the minutes of the meeting, Your Honor.

Mr. Hollingsworth: I will have to get them out here.

Mr. Lucking, Jr.: They were subpoenaed.

Mr. Hollingsworth: We have them here. March 4, 1935.

Mr. Lucking, Jr.: Thank you. Your Honor, we offer these minutes for identification and only as a part of the cross-examination.

Mr. Hollingsworth: Which minutes, you mean March 4, 1935?

Mr. Lucking, Jr.: That is correct. In other words, we do not know the contents of them and I don't intend to become bound——

The Court: What you are really doing is having the book, which Mr. Hollingsworth handed you as the minutebook, marked for identification?

Mr. Lucking, Jr.: Yes. I prefer to have the whole book marked for identification. We will be referring to it later, anyway.

Mr. Hollingsworth: That will be Plaintiff's 1 for identification.

The Clerk: Plaintiff's 2.

(The document referred to was marked Plaintiff's Exhibit 2 for Identification.) [119]

Mr. Lucking, Jr.: But only, Your Honor, as part of the cross-examination. We are not asking—as

(Testimony of Charles Justus Wilcox.)

to something to which we are necessarily bound——

The Court: You are not offering it into evidence now, as I understand.

Mr. Lucking, Jr.: We don't want to take a chance, Your Honor.

What page was that, again?

The Clerk: I believe it was 90.

Q. (By Mr. Lucking, Jr.): Mr. Wilcox, I show you this minutebook. I assume you are familiar with it, are you not?

Referring specifically to page 90 of the minutebook, at the top of which it states, "Annual Meeting of Stockholders of Ojai Mutual Water Company, March 4, 1935."

Does that appear to you to be in order, Mr. Wilcox?

Mr. Hollingsworth: I object to whether it is in order or not. Are they the minutes?

Q. (By Mr. Lucking, Jr.): Are they the minutes?

A. They seem to be the minutes of March 4, 1935. As to the exact contents of those minutes, the wording of them and so forth, I haven't the slightest recollection; it is too far back.

Q. Now, I refer you to a portion about the middle of the page, which I will ask that you read to the Court, starting, "Upon roll call," and ending here (indicating), [120] with the words "ordered filed."

A. "Upon roll call it was found that a total of 1,740 shares out of a total of 2,003 shares of the

(Testimony of Charles Justus Wilcox.)

outstanding and issued stock of the corporation, were represented, either in person or by proxy, as follows:

"C. J. Wilcox owning and holding one share.

"H. T. Sinclair owning and holding one share.

"C. J. Wilcox holding the proxy of Florence Scott Libbey for 326 shares.

"C. J. Wilcox holding the proxy of The Ojai Valley Company for 1,412 shares.

"Said proxies are read, found to be in order, and ordered filed."

Q. Thank you, Mr. Wilcox. Were there any other stockholders present?

A. I have no recollection now. It is too far back.

Q. Do the minutes refer to any others?

Mr. Hollingsworth: The minutes speak for themselves.

Mr. Lucking, Jr.: I am asking him to speak, counsel.

The Witness: No other names mentioned in the minutes, in these minutes (indicating).

Q. (By Mr. Lucking, Jr.): Now, will you examine the minutes and state whether or not there is any recital of any notice having been given of the meeting?

Mr. Lucking, Jr.: Will counsel stipulate there is no such reference? [121]

Mr. Hollingsworth: The minutes speak for themselves, Mr. Lucking. I don't know.

Mr. Lucking, Jr.: Will counsel stipulate that the minutes of the meeting referred to here, of March

(Testimony of Charles Justus Wilcox.)

4, 1935, may be copied into the record by the reporter in full, without having to read them——

Mr. Hollingsworth: Oh, surely.

Mr. Lucking, Jr.: ——at length into the record?

Mr. Hollingsworth: Surely, I have no objection to that at all.

Mr. Lucking, Jr.: All right.

The Court: You are offering them into evidence by that means rather than taking them out of the book and having them physically received into evidence?

Mr. Lucking, Jr. I think that would be better than detaching them, Your Honor, if that is satisfactory.

The Court: They may be received in that manner. [122]

(The minutes of the Annual Meeting of Stockholders of Ojai Mutual Water Company of March 4, 1935, are in words and figures, as follows, to wit:)

Annual Meeting of Stockholders
of Ojai Mutual Water Company
March 4, 1935.

The regular annual meeting of the stockholders of the Ojai Mutual Water Company is called and held pursuant to the By-Laws of the corporation on Monday, March 4th, 1935, at the hour of 2:00 o'clock p.m. at the office of the corporation in the City of Ojai, County of Ventura, State of California.

(Testimony of Charles Justus Wilcox.)

C. J. Wilcox, President of the corporation acted as temporary chairman of the meeting and called the meeting to order; Douglas E. Burns, appointed as secretary pro tem, acted as secretary of the meeting.

Upon roll call it was found that a total of 1740 shares out of a total of 2003 shares of the outstanding and issued stock of the corporation, were represented, either in person or by proxy, as follows:

C. J. Wilcox owning and holding 1 share.

H. T. Sinclair owning and holding 1 share.

C. J. Wilcox holding the proxy of Florence [123] Scott Libbey for 326 shares.

C. J. Wilcox holding the proxy of the Ojai Valley Company for 1412 shares.

Said proxies are read, found to be in order, and ordered filed.

The chairman of the meeting thereupon announced that a quorum is present and that the meeting is qualified to proceed.

The minutes of the last meeting of stockholders, being minutes of the annual meeting thereof held March 5th, 1934, and also the minutes of the regular organization meeting of the Board of Directors held on the same date, were read and approved.

Matter of Financial Statement

A financial statement of the corporation as of date December 31st, 1934, is presented and read. Upon motion duly made and seconded, it is ordered that said report be, and the same is hereby accepted

(Testimony of Charles Justus Wilcox.)

and approved and ordered filed and entered in these minutes. A full and correct copy of said statement appears on a succeeding page of these minutes.

Resolution Adopting and Approving Amendment of Articles of Incorporation

Whereas, it is deemed by the shareholders of this corporation to be to its and to their best interests that its Articles of Incorporation be [124] amended to provide that any stockholder desiring to use and using water of the corporation shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof, to which said water is to be delivered for use thereon instead of one share for each one-quarter acre of land or fraction thereof.

Now, Therefore, Be It Resolved that the second paragraph of the Article designated as "Second" of the Articles of Incorporation of this corporation be amended to read as follows:

"Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the By-Laws of the company may de-

(Testimony of Charles Justus Wilcox.)

termine. Mere ownership of stock in said company or of land situated within the above [125] described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible."

Resolved Further that the shareholders of this corporation hereby adopt and approve said Amendment of its Articles of Incorporation.

The adoption of the foregoing resolution having been duly moved and seconded and a vote thereon being taken, the same was unanimously adopted.

Matter of Amendment to By-Laws

The following resolution is proposed and upon motion duly made and seconded, unanimously adopted, to wit:

Whereas an amendment to the Articles of Incorporation has been adopted and approved to provide that any stockholder of the corporation shall be the owner of at least one share of the capital stock of the corporation for each acre of land or fraction thereof, to which said water is to be delivered for use thereon, instead of one share for each one-quarter acre of land or fraction thereof.

Now, Therefore, Be It Resolved that in order to make the By-Laws of the corporation conform in this regard, it is ordered that said By-Laws be and they are hereby amended in the following respects:

In Article XIV. Subdivision A, at page 9 [126] insert between the word "of" and the word "one" in the eighth from the last line on said page, the

(Testimony of Charles Justus Wilcox.)

words "at least," and in the seventh from said last line strike out the words "one-quarter."

In the same Article, subdivision B, at page 10, in the sixth from the last line on said page between the word "of" and the word "one" insert the words "at least" and strike out the word "one-quarter."

In the same Article, subdivision E, at page 13, in the fifth line between the word "of" and the word "one" insert the words "at least" and strike out the word "one-quarter."

Matter of Election of Board of Directors

Thereupon followed the election of the Board of Directors for the ensuing year. C. J. Wilcox, H. T. Sinclair and T. Ernest Clark are nominated for membership on the Board and a vote being had, each of said persons received 1740 votes and thereupon the presiding officer declared that said persons are elected as Directors of the corporation for the ensuing year and until their successors are elected and qualified.

Matter of Approving Acts of Directors and Officers

Upon motion duly made and seconded it is unanimously ordered and resolved that all of the acts of the Directors of the corporation and of the officers thereof as [127] appearing in the previous minutes since the date of the last annual meeting of stockholders be and the same are hereby ratified and approved.

(Testimony of Charles Justus Wilcox.)

There being no further business before the meeting, the same adjourned.

Approved:

/s/ H. T. SINCLAIR,
Vice President.

Attest:

/s/ DOUGLAS E. BURNS,
Secretary. [128]

Q. (By Mr. Lucking, Jr.): Mr. Wilcox, was Mr. Harmon present at that meeting?

A. There is no mention in the meeting of his being there. In fact, it doesn't mention any individual.

Q. Do you have any independent recollection of whether or not Mr. Harmon was there at that meeting? A. No, I have not.

Q. Do you have any independent recollection of the meeting at all?

A. I believe I testified to that effect.

Q. I would like to have you answer it, Mr. Wilcox. I don't believe you did. A. Well——

Mr. Lucking, Jr.: Miss Reporter, would you read the question, please?

(The question referred to was read.)

The Witness: No, I don't know. I know it occurred, that's all, from correspondence which I could not locate.

Q. (By Mr. Lucking, Jr.): Now, Mr. Wilcox, in your deliberations, you yourself, as a director of

(Testimony of Charles Justus Wilcox.)

Ojai Mutual Water Company, over the question of whether or not to amend these articles, did you consider the difference, if any, in the final result to be achieved between pasing the 1935 amendment in the form shown in those minutes, wherein, in practical effect, the requirements of four shares per acre were reduced [129] to one share per acre, and, on the other hand, the effect of amending the articles to provide for an authorization of, say, an additional 4,000 shares, and then issuing those 4,000 shares to the Ojai Valley Company?

Mr. Hollingsworth: I object to that question, may it please the Court. That is not relevant as to whether or not the amendment was valid or invalid.

Mr. Lucking, Jr.: It has a very, very great effect on it, Your Honor.

The Court: How? We are talking about the physical adoption of an amendment.

Mr. Lucking, Jr.: Your Honor please, we have contended all along that this 1935 amendment—as to whether or not it is valid—depends upon two things: One, a pure issue of law, of whether controlling stockholders can pass such an amendment and thus perpetuate control. The other one is a mixed question of fact and law, as to whether or not notice was required. It is a two-headed question, Your Honor.

The Court: Objection sustained. Recess until 2:00 o'clock.

(Thereupon, at 12:00 o'clock, noon, a recess was taken to 2:00 o'clock, p.m., of the same date.) [130]

Tuesday, May 31, 1955—2:00 P.M.

Mr. Lucking, Jr.: Your Honor please, I apologize to the Court for apparently being a little thick, but is it the Court's ruling that we are trying now the single issue of fact, of whether or not statutory notice was given of 1935 amendment?

The Court: Whether or not the notice required by law was given and if notice was required by law. We are trying that issue respecting—to determine, as a matter of fact, what the factual situation was respecting notice, and then what the legal result of that factual situation is.

Mr. Lucking, Jr.: All right, Your Honor. That being the case, Your Honor, I have just one further question to ask Mr. Wilcox.

Mr. Hollingsworth: Will you come forward, please, again, Mr. Wilcox.

The Court: If it is only one question, ask him where he is. If you mean that as lawyers usually do, a short series of questions, we will have him back on the stand.

Mr. Lucking, Jr.: I will ask him right here, Your Honor, if it is all right, and Mr. Wilcox doesn't mind.

CHARLES JUSTUS WILCOX

the witness on the stand at the time of adjournment, being heretofore duly sworn, was examined and testified further as [131] follows:

Examination
(Continued)

By Mr. Lucking, Jr.:

Q. Mr. Wilcox, you as president and director of Ojai Mutual Water Company in 1935, when the phrase was used in the minutes, the meeting was held "pursuant to the by-laws," what does that mean to you as an officer, as president and director?

Mr. Hollingsworth: I object to that. It would purely be a conclusion of the witness, Your Honor. The by-laws speak for themselves, and we have them here.

The Court: Sustained.

Mr. Lucking, Jr.: No further questions of Mr. Wilcox, except that we reserve the right, Your Honor, if the Court please, to recall him for any further cross-examination for any of the other issues.

The Court: Surely.

(Witness excused.) [132]

Mr. Lucking, Jr.: I will call Mr. Lucking, the plaintiff.

WILLIAM ALFRED LUCKING

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your full name, sir?

The Witness: William Alfred Lucking, L-u-c-k-i-n-g.

Direct Examination

By Mr. Lucking, Jr.:

Q. Where do you reside, please, Mr. Lucking?

A. In Washtenaw County, Michigan.

Q. Are you a stockholder of the Ojai Mutual Water Company? A. I am.

Q. How long have you been a stockholder, Mr. Lucking?

A. Well, since the first purchase from Mrs. Libbey in 1928. I believe the shares were issued probably when the contract of purchase was signed and entered into, and possibly held until the purchase price was completed.

Q. From that time until this date is it true that you have been a stockholder continuously in Ojai Mutual Water Company? A. Yes, sir.

Q. Mr. Lucking, did you receive any notice whatsoever of the 1935 stockholders meeting of the Ojai Mutual Water [133] Company?

Mr. Hollingsworth: I object to that question, Your Honor, upon the ground that it is incompetent and irrelevant at this time, and no proper foundation laid. It isn't a question of whether or not he

(Testimony of William Alfred Lucking.)

received notice. The question is, was there a failure to send out a notice.

The Court: Supose he says, "Yes, I received one." Then that would be some evidence of what was sent out.

Mr. Hollingsworth: That would be some evidence, but, on the other hand, if he said he did not receive one, it would be no evidence that one was not sent.

The Court: It may be that it would not be sufficient evidence to show that one had not been sent, but it would be some evidence in that direction, and if properly connected up, it could support other evidence, or be supported by other evidence, to the extent that the Court could draw an inference one way or the other, so the objection is overruled.

The Witness: Will you repeat the question, please?

Mr. Hollingsworth: Did he answer the question?

Mr. Lucking, Jr.: He asked that the question be repeated.

(The question was read.)

The Witness: No, sir, neither written nor verbal, from any source.

Q. (By Mr. Lucking, Jr.): Mr. Lucking, during your [134] entire time as a stockholder of the Ojai Mutual Water Company, have you ever at any time received any notice as a stockholder from the Ojai Mutual Water Company?

(Testimony of William Alfred Lucking.)

Mr. Hollingsworth: That is immaterial, Your Honor. That is not the issue here.

The Court: Overruled. I think the things you have in mind, counsel, might go to the weight, but I believe that within the area of admissibility the interrogation is proper.

The Witness: I would like to have the question repeated again.

Mr. Lucking, Jr.: Miss Reporter, will you read the question?

(The question was read.)

The Witness: Well, no notice of any corporate meeting or stockholders meeting, or anything of that sort. I probably got notices at times of water rates that were not paid, and things like that, but that is all. [135]

Mr. Hollingsworth: I move that last be stricken as not responsive, Your Honor.

The Court: Motion granted. No, I will take that back. Although not responsive, it is something which could have been elicited by a proper question, so I will let it stand.

Q. (By Mr. Lucking, Jr.): Mr. Lucking, have you ever at any time, when you were a stockholder, received any financial notices from Ojai Mutual Water Company, other than bills and delinquent statements possibly?

Mr. Hollingsworth: We make the same objection on the ground it is irrelevant and immaterial on the issue now before the Court.

(Testimony of William Alfred Lucking.)

Mr. Lucking, Jr.: Your Honor please——

The Court: I will overrule it. But I think these things, other than the notice of the type which is involved or contended to be involved on this issue, should not be gone into very extensively.

Mr. Lucking, Jr.: All right. I will apologize, Your Honor. Withdraw the question.

The Court: Answer the question.

The Witness: I have never received any report of any kind as a stockholder of the Water Company from any of the officers of the company on any subject of any kind, that I know anything about, either an annual report or report of conditions, or a report of water shortage in 1948, or the [136] new well, or anything else as a stockholder.

Mr. Hollingsworth: We ask that that latter part of the answer be stricken out, Your Honor. It is purely a voluntary statement on the part of the witness and not within the issues now before the Court.

The Court: Beginning where?

Mr. Hollingsworth: Well, back there where he said he never received any notice of any kind relative to the condition of the company or relative to a water shortage; following that.

Relative to receiving any notices from the company concerning its condition or water shortage in 1948, and then he made some other voluntary statement; I don't remember just what it was.

The Court: All right. Motion granted.

Q. (By Mr. Lucking, Jr.): Mr. Lucking, did you ever talk to Mr. Harmon about the 1935 amendment, so-called?

(Testimony of William Alfred Lucking.)

A. I never knew about the 1945 amendment——

The Court: You said 1945. Did you mean '35?

The Witness: I meant '35, Your Honor.

The Court: I thought you misspoke yourself.

The Witness: I had in mind fixing the date. I never knew about the amendment that has been under discussion here, the original Articles of the Water Company, until in the spring of 1948 when I was out here and was given full [137] inspection of all the company's records at the company's office when I asked for them.

Then I learned first of this amendment referred to at length altering the requisite four shares per acre, under the original Articles, to one share per acre, in substance.

The Court: I think generally we will get along more expeditiously if you will try to keep the answers short.

The Witness: I will, Your Honor.

The Court: Let's have a series of short questions and short answers, rather than trying to cover too much at one time.

The Witness: Very well, Your Honor.

Q. (By Mr. Lucking, Jr.): May I repeat the question: Did you ever talk to Mr. Harmon about the 1935 amendment, Mr. Lucking? A. Yes.

Q. When did you do that first?

A. At the time I was examining the books and records of the company in the spring of 1948.

Q. Where was that?

(Testimony of William Alfred Lucking.)

A. In the company's offices in Ojai, on the main street.

Q. Was this the first conversation you had with Mr. Harmon relative to the 1935 amendment?

A. I had just learned of that at that time, yes, sir, [138] of the amendment, I mean.

Q. Now, would you, with regard to the 1935 amendment, recite to the Court very briefly what your conversation with Mr. Harmon was, please?

Mr. Hollingsworth: That is incompetent, what Mr. Harmon said about it. It wouldn't go to show notice or lack of notice.

Mr. Lucking, Jr.: I will connect it up, Your Honor. His answer is going to be directly to notice. If it doesn't go to notice, I will stipulate it can be stricken.

The Court: All right.

The Witness: Will you read the question, please?

(The question was read.)

The Witness: In the office at that time, after I had spent some hours on the books and records, minutes of meetings and the like, I told Mr. Harmon that I had never known anything about the amendment to the bylaws, changing the requisite number of shares required by the original Articles from four shares to the acre to one share to the acre.

I had never had any notice of it and had no understanding about it of any kind.

He replied to me, if I am permitted to state what his reply was.

(Testimony of William Alfred Lucking.)

The Court: I think the question called for it. Yes, go ahead and tell us. [139]

The Witness: Mr. Harmon replied that no notice was necessary to me for that, to cover that amendment or that meeting of March 4, 1935, which I had just read of in the minutebook.

Mr. Hollingsworth: We move the latter part of the answer be stricken out. There is no authority here of any kind shown, on the part of Mr. Harmon, to bind the corporation or any other instrumentality here concerning the giving or failure to give notice, according to law.

If Mr. Harmon said it, there is nothing to connect here he had any authority to make any such statement, if he made such a statement to Mr. Lucking.

The Court: I think I have in mind the rule that you are urging here. Counsel has said he will connect it up. Unless he does, I will strike it.

Mr. Hollingsworth: Then it may come in subject to a motion to strike?

The Court: Certainly.

Mr. Hollingsworth: All right.

Q. (By Mr. Lucking, Jr.): With regard to that 1935 amendment, Mr. Lucking, was anything else said, do you recall, concerning notice?

A. Not at that time, when I was making this examination I have spoken of.

Q. Were there any later conversations with Mr. Harmon [140] directly relating to the matter of formal notice of the 1935 stockholders' meeting?

(Testimony of William Alfred Lucking.)

A. No other conversation that I recall now on that particular subject of the lack of notice to me and my lack of knowledge of the amendment.

Mr. Lucking, Jr.: I have no further questions. Do you wish to examine?

Mr. Hollingsworth: No, I have no questions. [141]

The Witness: On this issue, Your Honor. I wouldn't like to be excused——

The Court: Yes.

Mr. Lucking, Jr.: With the same reservation, Your Honor, please.

The Court: Yes. [142]

* * *

RAWSON B. HARMON

called as an adverse witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Examination

The Clerk: Your full name, please?

The Witness: Rawson B. Harmon.

Mr. Lucking, Jr.: Now, Your Honor please, I am calling Mr. Harmon under the authority of Rule 43(b) as an adverse witness, as under cross-examination, and the preliminary questions I believe will show it.

The Court: Do you admit, Mr. Hollingsworth——

(Testimony of Rawson B. Harmon.)

Mr. Hollingsworth: He is the managing agent, Your Honor. We have no objection to Mr. Harmon being interrogated under 43(b).

Mr. Lucking, Jr.: Thank you.

Q. (By Mr. Lucking, Jr.): Mr. Harmon, where do you [144] reside, please?

A. Bill, I am a little hard of hearing, you know, and if you will come a little closer.

Q. Yes. Where do you reside, please?

A. Ojai, California.

Q. How long have you lived there, Mr. Harmon?

A. We have lived there since 1930.

Q. You are employed by The Ojai Valley Company? A. I am.

Q. And the Ojai Mutual Water Company?

A. I am employed by the Ojai Mutual Water Company, but I have a contract with The Ojai Valley Company. I am also a minor officer of The Ojai Valley Company.

Q. What is your office with The Ojai Valley Company? A. What is that?

Q. What office do you hold?

A. With The Ojai Valley Company?

Q. Yes.

A. I am assistant secretary and treasurer.

Q. You are assistant treasurer, also; is that correct? A. Yes.

Q. Is your answer "Yes?" A. Yes.

Q. Now, how long have you been assistant secretary, Mr. Harmon? [145]

A. Well, I am not quite sure.

(Testimony of Rawson B. Harmon.)

Mr. Hollingsworth: Of the——

Mr. Lucking, Jr.: Ojai Valley Company.

The Witness: The Ojai Valley Company you are speaking about?

Q. (By Mr. Lucking, Jr.): Yes.

A. I am not quite sure as to when I had the office. I have had my connection with it since 1935, since January, 1935, but I couldn't tell exactly when I was given that office. Sometime after my connection with the company.

Q. January of 1935 was the first time you became connected with The Ojai Valley Company?

A. Definitely, yes.

Q. What did you do in Ojai prior to that time, Mr. Harmon?

A. Well, I didn't spend all of my time there. I had my business in Detroit up until, oh, the end of 1938 or so. Well, up until 1940 I had an office and a business in Detroit, as well as in Ojai.

Q. But it is your testimony, is it, that at about the time, or shortly after you became connected with The Ojai Valley Company you also became a minor officer; is that correct?

A. Well, I would say it was in two or three years, anyway. The minutes would show, I suppose, of their meetings, [146] but I couldn't tell you the exact time.

Q. Now, with regard to the Ojai Mutual Water Company, you are also an officer of that, are you not? A. Yes.

Q. And what?

(Testimony of Rawson B. Harmon.)

A. I am vice president and assistant secretary.

Q. How long have you held the office of vice president of the Water Company?

A. Well, I couldn't say that exactly either. Now, early in my connection with the Water Company, I would say it would be sometime around 1940, probably, but the minutes might show that. My memory isn't quite as good as it used to be, Bill. I don't carry dates in my mind very well. [147]

Q. Do you recall when you first became employed by Ojai Mutual Water Company?

A. Yes, 1939.

Q. That was your first employment. You are also a director of Ojai Mutual Water Company, are you not? A. Yes, I am.

Q. When did you first become a director of the Water Company?

A. Well, I think at the time that I—in 1939, when I first became connected with it I was made a director.

Q. You have since 1939, though, been vice president, assistant secretary and director of Ojai Mutual Water Company, is that correct?

A. That is right, yes.

Q. Are you a stockholder of the Mutual Water Company? A. Yes, I am.

Q. When did you become a stockholder?

A. Quite early, in about 1930, I think. I bought some property there across from Sinclair. I got

(Testimony of Rawson B. Harmon.)

four shares, three or four shares of stock with it then.

Q. Did you later acquire more stock?

A. No, that is all the stock I have.

Q. Now, were you in Ojai during the spring of the year 1935?

A. I think I was. I can't be absolutely sure, because [148] I was going back and forth at that time to Detroit. But I think I was there in the spring of '35.

Q. Do you have an independent recollection of the 1935 stockholders' meeting of the Water Company?

A. No, I had nothing to do with the Water Company at that time.

Q. You were a shareholder, however, were you not, as you testified?

A. Yes, I think just about that time I became a shareholder; very close to that.

Q. Mr. Harmon, you said you became a stockholder in about 1930, when you first purchased, is that correct?

A. I think we bought that property from Kritzel in the early days, and I can't exactly remember when it was, Bill, but it was between '30 and '35.

Q. Actually it was about 1933, was it not?

A. Probably was.

Q. Does that refresh your memory?

A. It is awfully hard for me to keep dates in

(Testimony of Rawson B. Harmon.)

mind. When we came there fairly early we bought that property.

Q. Do you have any independent recollection whatsoever of having received actual written notice of any stockholders' meeting at or about that time?

A. No.

Q. 1933 to 1937, say. [149]

A. No, none whatever.

Q. No recollection at all? A. No.

Q. Yet you were a stockholder in the spring of 1935, is that correct?

A. I am sure I was, yes.

Q. Do you know who suggested the reduction, or, rather, who suggested the 1935 amendment, reduction from four shares per acre to one share per acre?

A. No, I don't think so. I think it was discussed around the office there. From experience with the one share to the acre over the years now—this doesn't include possibly those very early years, but over the years we discovered in operating The Ojai Valley Company and selling lots there it was not necessary to have that four shares to the acre.

Mr. Lucking, Jr.: I move that part be stricken, Your Honor, that is, a necessity of four shares per acre; non-responsive.

The Court: Motion granted.

Q. (By Mr. Lucking, Jr.): But you were around the office, were you, in 1935? A. Yes.

Q. In what capacity?

A. I had a contract with The Ojai Valley Com-

(Testimony of Rawson B. Harmon.)

pany to [150] take over their real estate, to sell the real estate.

Q. Had you started to operate in that capacity?

A. Yes, I had.

Q. That was about January of 1935?

A. It was January of 1935; I think it was. That is the definite date of the contract, as I remember it. It was either '34 or '35, but I think it was '35.

Q. Now, at that time did you have an office in the same building? A. Oh, yes.

Q. There in Ojai? A. Yes.

Q. In other words, in the same building with the Water Company and with The Ojai Valley Company?

A. Yes, that is the same thing together, the offices. They are right together.

Q. Was Mrs. Eldred Jackson at that time an employee? A. She was.

Q. Of what company?

A. Both companies, I think.

Q. Do you know how long she had been an employee?

A. She kept the books. Well, early days—I think she came there first when Mr. Libbey was there, but I have no definite knowledge of my own, except hearsay.

She had been there long before I came there, and I [151] understood she was there when Mr. Libbey was.

Q. From the time you first arrived at or prior

(Testimony of Rawson B. Harmon.)

to January, 1935, were you familiar with the office practice?

A. No, not very—to any extent, no.

Q. From the time you first arrived subsequent to then?

A. The time of my association with them, I was familiar with it then.

Q. Did Mrs. Jackson at that time work for you, also?

A. Yes—well, she did, she was working for the office, and, of course, I was in charge of the office there when I first came in 1935.

Q. You were in charge of the office from at least January of 1935 or before, and from?

A. Yes.

Q. From the material time, subsequently to that?

A. Particularly with my connection in The Ojai Valley real estate then. I didn't have anything to do with the Water Company.

Q. Being in charge of the office, what did you do? A. Trying to sell real estate mostly.

Q. Was Mrs. Jackson an employee of yours, to some extent?

A. Well, no, she was not my personal employee at all.

Q. You managed her, did you not? [152]

A. Yes, the office there, I did; from the real estate angle only.

Q. Did Mrs. Jackson during this period——

From the time you first became connected there with The Ojai Valley Company and took up office

(Testimony of Rawson B. Harmon.)

spaces there, did Mrs. Jackson act as office manager, so to speak?

A. Yes, she did.

Q. Office manager, as employee of Ojai Mutual Water Company?

A. Well, I presume so. I knew it more particularly as The Ojai Valley Company. I was not concerned with the Water Company at all when I first took up my connection with the ——

Q. But she was office manager, in practical effect?

A. She was, yes, when I came in the office.

Q. She has since that time acted continuously in that capacity, has she not?

A. She has and she is a good one, too.

Q. I know it. Has she kept the books and papers and records of the Water Company?

A. Both companies.

Q. And of The Ojai Valley Company?

A. That is right.

Q. She kept custody of the minutes of the meetings of Ojai Mutual Water Company? 153]

A. That I wouldn't know. In those early days, but I assume she did. The secretaries, whoever they were at that time, kept the minutes, I suppose. Whether she wrote them and attended the meetings, I couldn't say.

Q. Was the minutebook kept at the offices there in Ojai?

A. Yes, the Ojai Valley books; the main books are kept in Toledo. We had a set of books out there for the real estate there.

(Testimony of Rawson B. Harmon.)

Q. Including the minutebook?

A. We reported back and forth. I don't think the main Ojai Valley Company books were kept in Ojai.

Q. Were letters and corespondence with the stockholders of the Water Company carried on by the Ojai office?

A. Well, I assume they were. As I say, I don't have—when are you speaking of?

Q. During 1935.

A. No, I don't know about that definitely, because I had really no connection with the Water Company in my early days there. Mr. Clark was the manager of the Water Company when I first came there.

Q. Are you familiar with any change in practice between what was done then and what is done now? Are you aware of any change?

A. I assume I have some knowledge of it. [154]

Q. Did Mrs. Jackson send out the bills for water dues during 1935?

A. She did, yes, I would say she did.

Q. Did she send out delinquent notices from the Ojai Valley office?

A. She had charge of sending out the bills.

Mr. Lucking, Jr.: I have no further questions.

Mr. Hollingsworth: No questions.

Mr. Lucking, Jr.: Again, our request of leave to recall Mr. Harmon if necessary. [155]

* * *

RAWSON B. HARMON

recalled as a witness, having been previously duly sworn, testified further as follows:

Examination

The Witness: Do I have to be sworn again?

Q. (By Mr. Lucking, Jr.): No. Mr. Harmon, have you, as a stockholder of the Water Company, ever received written notice of any annual stockholders meeting of the Water Company since you became a stockholder in 1933, or thereabouts?

Mr. Hollingsworth: That is objected to as immaterial. The by-laws speak for themselves.

The Court: Overruled.

Q. (By Mr. Lucking, Jr.): Would you like to have the question repeated, Mr. Harmon?

A. What is that?

Q. Would you like to have the question repeated, please?

A. No. Does the judge—do I have to answer it?

Q. Yes, you may answer it.

The Court: Answer it. If you have a recollection on that subject, tell us.

The Witness: I don't think I have had any notices of annual meetings. We don't send them out, generally speaking.

Q. (By Mr. Lucking, Jr.): You have no recollection of any—I will rephrase that.

A. The annual meetings, no. It is my understanding [167] that, under our setup there, that no notice is required to be sent out of the annual meeting of the stockholders.

(Testimony of Rawson B. Harmon.)

Q. And it is your understanding, though, that you have never received a notice of an annual meeting?

A. Well, I wouldn't receive it anyway, because we would be the one to send it out there in the office.

Q. You are a stockholder, Mr. Harmon?

A. Yes, I am a stockholder, that is true.

Q. And you have been since 1933, when you bought the Twitchell property?

A. Well, I would know about the annual meetings, because we send out the call.

Q. Do you know of any notice having been sent out of any annual meeting of stockholders to the stockholders generally?

A. Not during my time there.

Mr. Lucking, Jr.: I have no further questions.

Mr. Hollingsworth: No questions. [168]

* * *

MRS. ELDRED JACKSON

recalled as a witness by the plaintiff, being previously duly sworn, was examined and testified further as follows:

Examination

By Mr. Lucking, Jr.:

Q. Mrs. Jackson, as an employee of the defendant company from 1934 on, and during your tenure in office there, did you ever see any notices to stockholders of stockholders' meetings or of any stock-

(Testimony of Mrs. Eldred Jackson.)

holders' meeting being typed up or mimeographed or sent out of that office?

Mr. Hollingsworth: That is objected to as immaterial, Your Honor, unless it is directed to this amendment. Subsequent to 1935 would be incompetent, irrelevant and immaterial.

Mr. Lucking, Jr.: I think it goes to the weight, Your Honor.

The Court: Suppose he establishes a custom to never send out notices?

Mr. Hollingsworth: It shows, Your Honor, she came in there after the 1935 amendment. What she did or what occurred after she came in would not be material in establishing any custom prior to that time or at that time.

The Court: Sustained. [169]

Q. (By Mr. Lucking, Jr.): Mrs. Jackson, in 1935, while you were working in the company office up there, did you see any notices being sent out to stockholders of the Water Company, noticing an annual stockholders' meeting?

Mr. Hollingsworth: Just a moment, please. If that is directed, if that is directed to notices she sent out—is that what you are directing it to?

Mr. Lucking, Jr.: No.

Mr. Hollingsworth: Whether she saw any notices in the office?

Mr. Lucking, Jr.: That is correct, Your Honor.

Mr. Hollingsworth: I say it is incompetent, what she might have seen in the office.

The Court: Sustained.

(Testimony of Mrs. Eldred Jackson.)

Q. (By Mr. Lucking, Jr.): In your employment by the Ojai Volley Company in 1935, Mrs. Jackson, did you receive the Ojai Valley Company mail?

Mr. Hollingsworth: What was that last part of the question? You don't speak quite loud enough.

Mr. Lucking, Jr.: Will you read the question?

(The question was read.)

Mr. Hollingsworth: I presume that is a preliminary question. I won't object to that.

The Witness: I did not.

Q. (By Mr. Lucking, Jr.): Who did, please?

A. Mr. Burns was working at the office at that time. My work was almost entirely at the Ojai Valley Country Club during the season it was open; during the time it was open, I should say.

Q. In other words, you spent most of your time up at the club and not at the downtown office?

A. Until the club closed in May. [171]

* * *

Mr. Lucking, Jr.: If Your Honor please, I submit the by-laws as Plaintiff's 3 for Identification, reserving leave to question them as to their regularity and so on, since we are not familiar with this set.

Mr. Hollingsworth: Aren't those the by-laws of the [173] Water Company?

Mr. Lucking, Jr.: That is correct.

Mr. Hollingsworth: Yes, that is right.

Mr. Lucking, Jr.: I am just looking for——

Mr. Hollingsworth: Section 7.

Mr. Lucking, Jr.: Article II, Section 7. I would like to read into the record——

Mr. Hollingsworth: Why don't you just offer it in evidence and have the Court reporter put it in?

Mr. Lucking, Jr.: I offer Article II, Section 7, of the by-laws in evidence. The title of Section 7, "Notice of Regular Meeting. No notice shall be required to be given of any regular meeting of the board of directors, but each director shall take notice thereof."

Excuse me. It should be of the stockholders.

I beg your pardon, Your Honor. I wish to correct that. It is Article I, entitled, "Meeting of Stockholders." Section 3. "Notice of Regular Meetings. No notice whatever shall be given of the regular annual stockholders' meeting, but each stockholder shall take notice thereof."

The Court: You offer that into evidence——

Mr. Lucking, Jr.: I offer that as Plaintiff's 3.

The Court: ——by the process of reading it into the record?

Mr. Lucking, Jr.: That is correct. [174]

* * *

The Court: All right. We will hear Dr. Butler tomorrow. I wondered, Mr. Hollingsworth, how you are going to sustain your position if the Court should find that notice was not given.

Mr. Hollingsworth: That notice was not given?

The Court: Yes. If these witnesses should lead me to that conclusion, then what of it?

Mr. Hollingsworth: I don't think, Your Honor, under the cited cases, that there was any evidence here to show that [175] notice was not given. The only thing is that somebody didn't receive a notice of the meeting of the stockholders, at which the amendment of March 4, 1935, occurred.

Now, that standing alone is not evidence of the fact that no notice was sent out. We have to rely upon the presumption for the reasons that I have heretofore stated to the Court.

The presumption is definite, clear, plain. Section 362(b) of the Code, to the effect that the certificate of the Secretary of State is evidence of the fact—I am referring now to the 1933 Code—I have already stated the Legislature did not adjourn in 1935 until some time, I think it was the 17th of June; under constitutional provision the effective date of the amendment would not take place within the 90-day period—I mean would take place prior to the expiration of the 90-day period and consequently Section 362(b) of the 1933 Code applies.

Now, under the title of the section of the '33 Code, you go over to Section 362 of the same Code and it provides how an amendment to the Articles of Incorporation may be had.

The heading to Section 362 of the 1933 Code says, "By complying with the following provisions a corporation may amend its articles for any or all of the following purposes:"

Then it sets out specifically the manner in which the [176] amendment may be made. Then you go over to 362(b), and you find under the filing of the

certificate, that the certificate shall be submitted to the Secretary of State, "who shall file the same and put an endorsement of filing thereon, if he finds that it shows a compliance with the provisions of this section," which is Section 362(b), which provides how the amendment, the mechanics necessary to bring about the amendment.

The Court: Including the notice?

Mr. Hollingsworth: Yes. Then it says, "If he finds that it shows a compliance with the provisions of this section, thereupon the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto certified by the Secretary of State shall be evidence of the performance of the conditions necessary to the adoption thereof:" [177]

Now, we have to rely on it. Nobody else connected with the Valley Company, nobody connected with the Mutual Water Company, nobody—no stockholders in attendance at any of the meetings has come forward and stated that at that time the necessary requisite for the adoption of the amendment had not been complied with, and that no notice had been sent out. And there are cases holding, Your Honor, that the question of laches and the question of estoppel may arise.

We feel that it is a perfect case, and if Your Honor asked me the question on the specific point: How are we going to show that notice was sent out, in view of the testimony that has been received by the Court, my answer would be that it is not necessary.

The Court: I had intended to ask you: Suppose the Court, after analyzing the evidence on this subject, and in weighing against the presumption—the presumption being evidence, too—finds that there is a conflict between the evidence which Mr. Lucking is producing and the presumption upon which you rely, and resolves that conflict in favor of the plaintiff, where does that leave you?

Mr. Hollingsworth: My answer is a very plain one, Your Honor. Negative proof alone is not sufficient to overcome an affirmative presumption created by statute. All the proof is negative.

The Court: Yes. I recognize that that is a principle [178] to be considered in resolving the burden, or in resolving the conflict——

Mr. Hollingsworth: It is purely negative.

The Court: ——or in resolving the evidence.

Mr. Hollingsworth: Actually, there is no conflict on negative testimony. There would have to be some affirmative testimony.

The Court: Suppose it does come in?

Mr. Hollingsworth: If it does, then that is another question. Then Your Honor would have to resolve the conflict.

The Court: Then where does that leave the lawsuit? Supposing that would be resolved against you —I would like to be educated here a little bit as to your views on it, so that we will be able to know your position.

Mr. Hollingsworth: I don't think it has any effect on the lawsuit at all. The fact of the amendment, cutting to one share per acre, that is, cut-

ting down the allotment of stock to one share per acre, would not make it obligatory upon the corporation to issue more shares of stock in order to furnish to present users four shares per acre. I don't think that is the practical solution at all. I don't think it creates any cause of action on the part of any stockholder to demand or receive additional shares of stock, where the corporation for over a period of 20 years has been operating on one share per acre basis. [179]

That is my present opinion, and we have never tried to put any amendment through that would affirmatively show notice, because we are satisfied with the statutory presumption that we did what we were required to do according to law, and there is yet no testimony to show that we have done anything, or failed to do anything which the law required that we should or should not do.

I am satisfied of that under the cases, that it does not change the picture at all. If somebody should buy an acre of land out there now, we will say tomorrow, and come to us and tell us they wanted four shares of stock per acre, under the articles of incorporation we are not required, and there is no mandate on the part of the Water Company to furnish a purchaser of land with a share or shares of stock. The articles of incorporation specifically take care of that.

It was organized on that basis, and for that particular purpose. It is not a mandatory thing.

Your Honor asked a question the other day about what is a mutual water company. I searched through

the Code trying to find the definition of a mutual water company, and I couldn't find one, but I think a mutual water company in common everyday accepted practice is one where water can be distributed only to qualified stockholders within a restricted area without profit. It has to be on a non-profit basis, because, Your Honor, under the case of Mound Water Co. [180] v. Southern California Edison Company, and other cases, it was held many years ago that a mutual water company is not a public utility, cannot be so classified, and cannot be subjected to the burden of a public utility system.

We are not a public utility. We do not have to furnish water. If we have a supply of water, it is a privilege on our part to furnish it, but we must do it on a non-profit basis. Now, that is the way we have operated.

We don't think, even assuming the amendment back in 1935 was not formally adopted in the manner Mr. Lucking says it should have been done, that it affects the legal rights of Mr. Lucking or any other shareholder or stockholder of the company, because after a lapse of 20 years there are certainly no rights on the part of past stockholders to come in and question the validity of that amendment at this late date, which is precisely what Mr. Lucking is doing, and the cases hold that he was bound with notice of the articles and bylaws, and the amendments thereto, when his first share of stock was issued to him, and for him to get on the stand and say he didn't know anything about it until he ex-

amined the articles of incorporation, or books, or minutes, whatever he may have looked at in the office, doesn't strengthen his position before this Court one bit, any more than his argument to the effect that we can only furnish water to Libbey land-owners, or any more to the effect that we can't take water to [181] somebody else, or deliver it to somebody else within the service area, or any more than the argument to the effect that our stock is appurtenant to the land, when the articles of incorporation absolutely negative it, and that it was set up for the express purpose of not becoming the purpose.

Those are all questions of law, Your Honor, that can be decided on briefs, or on further argument, if Your Honor wants it.

I don't know if the time of this Court should be taken up here for days on end to determine something that is already before Your Honor as a matter of law. It is purely a question of law.

The Court: That is the way it appears to the Court, except for this one matter which we have left open for evidence, that this case can be determined probably better on argument and briefs than by witnesses who will merely state legal conclusions.

* * *

Mr. Hollingsworth: I will read that portion of the Articles of Incorporation to you, also, which is reaffirmed in the amendment at the bottom of them.

First of all, the bylaws, Your Honor, referring to [185] Defendants' Exhibit B, describe the metes

and bounds description of land; Ventura County, containing 2,765 acres.

"Provided that any stock holder desiring to use and using said water shall be the owner of one share of the capital stock——"

This is the original Article——

"——one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the bylaws of the company may determine."

This is it:

"Mere ownership of stock in said company or of land situated within the above described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible."

Now, going over on the issue of the appurtenant stock of the Mutual Water Company, before the stock could become appurtenant there has to be a bylaw adopted to that effect and recorded in the Office of the County Recorder. [186]

Mr. Lucking, Jr.: By what authority, counsel? Excuse me.

Mr. Hollingsworth: I will read it in just a moment. I am reading now from Palo Verde Land & Water Co. v. Edwards, 82 Cal. App., at page 52.

The question arose in that case of a mutual water

company, whether or not the stock was appurtenant or nonappurtenant. The court held:

"Section 324 of the Civil Code predicates the attributes of personal property to shares of stock in a water company and that such shares remain personal property unless the corporation shall adopt and record in the Office of the County Recorder a by-law that the stock shall be appurtenant to the land. It would seem, therefore, that unless such a by-law be adopted the stock must remain personal property and not become appurtenant to the land." Citing a long list of cases here. And I am going over on page 59 of the opinion relative as to whether or not the stock was appurtenant or nonappurtenant. In that case it had been mortgaged and the question is whether the stock went with the land on a foreclosure of the mortgage or a pledge of the personal property. The court expressly held it was a pledge of personal property. On page 59 of the opinion: [187]

"There are no such provisions in the Articles of Incorporation or by-laws in the instant case. The only provisions to be considered here are in effect: That water shall be distributed only to lands upon which stock has been located; that stock shall be located only upon lands owned or claimed by the purchaser, and that the certificate shall contain a description of the land on which the shares are located.

"There is certainly nothing in any of these provisions which would prevent the transfer of the water stock to other lands or which would give to

the words 'location' or 'located' the meaning of 'appurtenant' or which would give to the shares of stock the fixed character of real property, contrary to the general provision of the law defining the character of shares of stock of a corporation as personal property."

On page 61 of the opinion:

"Section 324 of the Civil Code, as amended in 1895, was in force at the time of the incorporation of the respondent company, it being incorporated in 1908, and it would seem that if it were the intention of the incorporators that the stock should be appurtenant to the land they would have so provided [188] in their by-laws and complied with the section relative to recording and thus made the stock appurtenant to the land, which the trial court found not to be appurtenant, and which we think is the correct view."

Going down to later cases, the Bank of Visalia v. Smith, 146 Cal. 398, the owner of land, also owned five shares of stock of a mutual water company. He mortgaged his land to the bank. The bank foreclosed the mortgage, also claiming that the five shares of stock in the mutual water company went with the land, they not having been included in the description of the mortgaged property, despite the fact that the mortgage contained the provision: "* * * with all the water rights and privileges appurtenant to said ditch, or by means of which said ditch is supplied with water * * *"

The Supreme Court, in passing upon the question as to whether or not the stock was or was not ap-

purtenant, used the following language, quoting from page 400, 401 of the opinion:

"This description does not, however, mention the shares of stock nor do its terms give rise to any presumption that they are appurtenant to the Curtis Ditch, or that they represent any water-right or privilege 'by means of which said [189] ditch is supplied with water.' "

Then the court held:

" 'A thing is deemed to be appurtenant to land when it is by right used with the land for its benefit.' (Civil Code Section 662). Whether such appurtenance exists is a question of fact, to be determined upon extrinsic evidence, and the burden of establishing such fact is upon he who claims a right to the appurtenance. Shares of stock, as such, are not presumptively appurtenant to land, and if the plaintiff would claim that the shares of stock in question represent water-rights or privileges which are appurtenant to the Curtis Ditch, or by means of which the ditch is supplied with water, it was incumbent upon it to introduce evidence of such fact." [190]

We do not need such evidence in this case, your Honor, because the articles of incorporation have been pleadings set forth by the plaintiff in his complaint, expressly showing on its face that the stock is not appurtenant. He doesn't claim that his own stock is appurtenant. He just got shares of stock, his personal property.

That is the answer to Mr. Lucking's question as to whether or not—how are you going to make it

appurtenant? There would have to be an adoption in the by-laws to that effect.

I might call the court's attention to the certificate of the amendment to the by-laws offered in evidence as Defendant's Exhibit A, which again reiterates the fact that the mere ownership of stock in the corporation, provides that any stockholder desiring to use, and so on, that "mere ownership of stock in said company or of land situated within the above-described limits shall not entitle the stockholder to any water whatever, unless he and his land shall be otherwise eligible."

Mr. Lucking, Jr.: If that expressly states it is non-appurtenant, that is pretty good language. If, as a matter of law, the court were to determine in a given case it was, that that meant it was not appurtenant that would be one thing. It certainly is a matter of law, whether that language means it is non-appurtenant. I can't read any [191] expressed thing on it.

The Court: You contend the case before the court, in this case it is appurtenant?

Mr. Lucking, Jr.: We do, your Honor, contend that these defendants, by their affirmative acts, have made that stock appurtenant to the land of the users, the present users of water.

We will show and, incidentally, we have already filed with the court, pursuant to pretrial order, photostats of certificates of stock issued by these defendants, by the defendant Ojai Mutual Water Company, while under the complete domination and control of The Ojai Valley Company, which right,

on the face of those certificates, state these certificates, or these shares are appurtenant to Lot so-and-so, Block so-and-so, and naming the tract.

Now, I am familiar with the code section to which he refers, your Honor. The word "may" is used in that code section and it does not mean that is the only way to do it. The case of Smith v. Hallwood Irrigation Company, that we previously cited to the court, states very clearly whether or not stock is appurtenant is a question of fact.

It holds that the acts of the user and of the water company and the manner in which the water is furnished and used, as well as evidence of contract, all are admissible, to show whether or not as between the stockholders of the shares are [192] appurtenant.

Counsel cites the Palo Verde Land & Water Co. v. Edwards, and you will note there are two very great distinctions between what counsel sees in that case and our case.

In the first place, there was a bona fide purchase of a pledgee involved in that case. Here we are not trying to hold that these few users around the perimeter of these Libbey lands are not entitled to water. They bought their land on good faith and their shares on good fath, and we haven't raised the question in this proceeding as to whether or not they are entitled to water. They already own stock and already bought——

The Court: You raised the issue here in this proceeding as to who is entitled to water at all?

Mr. Lucking, Jr.: I think we have, your Honor, very clearly.

Mr. Hollingsworth: We never denied water to Mr. Lucking or anybody he claimed to represent.

Mr. Lucking, Jr.: That has nothing to do with it, counsel.

Mr. Hollingsworth: That we can't agree [193] with.

* * *

The Court: The Secretary of State used to be very careful—as I learned when I was practicing law and was representing corporations—and if your recitations were not complete or even if they were ambiguous, back came your articles and your amendments, with an explanation of why they cannot be filed.

I think the acceptance by the Secretary and the filing does give rise to a presumption that they were proper and in proper form and order.

What bothers me is whether this Section 362 of the [198] Civil Code is modified by Section 312 to the extent that the notice—well, I am troubled in formulating my thoughts. I think we had better adjourn and take it up tomorrow. [199]

* * *

Wednesday, June 1, 1955. 10:10 A.M.

The Court: Now, counsel, in this case on trial, we will finish taking the evidence on this immediate point, that we started on yesterday, and after taking the evidence on that I will give you a brief recess, and then we will argue it out, that particular

point, and hear any other motions which either of you feel inclined to make, as that particular phase of the case is concluded.

Mr. Hollingsworth: Do I understand, your Honor, you want, after the issue of the validity of the amendment has been presented to the court, you want that argued out?

The Court: I would like that argued out and then I will hear any motions that either side wishes to make, so that we may proceed to the next, whatever next phase of the case appears to be the proper one to go to.

Mr. Hollingsworth: I see.

Mr. Lucking, Jr.: If your Honor please, is the matter to be argument then after this last witness on this point, to be confined to the question of whether or not the statutory notice was given and required, or does the court desire us also to go into the matter of whether it makes any difference whether notice was given?

The Court: Yes.

Mr. Lucking, Jr.: The whole phase of the 1935 amendment? [203]

The Court: I would like you to go into that whole phase of the case, so that whatever problems there are in that particular phase of the case will be dealt with while we have it hot here and the testimony fresh in memory. [204]

* * *

DR. CHARLES T. BUTLER

called as a witness by and on behalf of the plaintiff, having been first duly was examined and testified as follows:

Direct Examination

By Mr. Lucking, Jr.:

Q. Your full name is Charles T. Butler; is that correct? A. That is correct.

Q. You are a physician, are you not?

A. Yes, sir.

Q. Where do you reside?

A. 1116 Foothills Road, Ojai.

Q. California? A. California.

Q. Now, how long have you lived in Ojai?

A. Approximately 25 years.

Q. Are you a stockholder of the Ojai Mutual Water Company? A. I am.

Q. When did you first become a stockholder of the Ojai Mutual Water Company, Dr. Butler?

A. April 1930. May I refer to a memorandum?

Q. Well, that year now is close enough. It is 1930 you first became a stockholder?

A. I believe so. [205]

Q. Now, have you been a stockholder continuously since that time? A. I have.

Q. Now, in 1930 is it a fact that you purchased real estate there in Ojai? A. I did.

Q. And you received at that time how many shares of stock, of water stock?

A. Ten shares of stock.

Q. Those particular 10 shares of stock you held

(Testimony of Dr. Charles T. Butler.)

for approximately how long, Doctor? Until what year? A. Until 1947, I believe.

Q. Prior to the time that you sold those shares, you purchased a different piece of property and obtained more shares; is that correct?

A. That is correct.

Q. Now, Doctor, during your time as a stockholder of the Ojai Mutual Water Company, have you ever received any written notice of a stockholders meeting of the Water Company?

A. To the best of my knowledge and belief, I never have.

Q. Did you ever receive any notice of any sort of the annual meeting of the stockholders of Ojai Mutual Water Company to be held in March, of 1935? [206] A. No.

Q. Doctor, did you, at my request, refresh your memory from certain records of yours with regard to this? A. I did.

Q. Would you describe to the court the nature of the records to which you refer?

Mr. Hollingsworth: That is not necessary. I object to that. He has already testified, your Honor, and there is no need to refresh his recollection. That is quite obvious. The matter has been testified to. Now, if we go back over any documents that he may have in his possession, from which he refreshed his memory, I submit that is immaterial at this time. His testimony is in the record.

Mr. Lucking, Jr.: Your Honor, I think it goes

(Testimony of Dr. Charles T. Butler.)

clearly to the weight, to show why Doctor Butler can testify as he has.

Mr. Hollingsworth: It does not go to anything. The man has testified under oath here that, to the best of his recollection, he never received any. There is no necessity now for refreshing his recollection.

The Court: I take it, this is not strictly present memory refreshed evidence. It might be that kind of evidence, but he is not strictly undertaking to refresh the memory of the witness now, but is undertaking to show the circumstances under which a court would give credence to the [207] fact that the memory has been refreshed concerning a matter which might not ordinarily be one that a person would retain in memory for so long a period of time, and would have to have some memory refreshment.

Is that what you are driving at?

Mr. Lucking, Jr.: That is the idea, your Honor. This happened 20 years ago, or thereabouts.

The Court: And to see how it is he has a memory of the subject that has been referred to. As you say, it is a long time ago, and I think it is proper for counsel to briefly go into it; not at great length.

Mr. Lucking, Jr.: All right, your Honor. We will try to make it very fast. [208]

Q. (By Mr. Lucking, Jr.): Doctor, you brought certain memory refreshers with you, did you not, at my request? A. I did.

Q. Will you bring those out?

(Testimony of Dr. Charles T. Butler.)

Mr. Lucking, Jr.: Your Honor please, we are not offering these in evidence, we are merely——

Mr. Hollingsworth: May I see them, please?

Mr. Lucking, Jr.: Certainly. It is to show the basis upon which Dr. Butler has refreshed his memory on the matter.

Q. By Mr. Lucking, Jr.: Doctor, would you describe what those items appearing as notebooks, appearing to be notebooks are?

A. They consist of weekly reminder pads for each year since 1930 to date.

Q. You didn't bring all of them from 1930 to date, did you, Doctor, with you? A. No.

Q. What years did you bring with you, please?

A. I have here from 1932 to 1936.

Q. Inclusive, is that correct?

A. Inclusive.

Q. Doctor, did you keep these reminder pads in your own handwriting? A. I did.

Q. Did you keep them from day to day, as the items in [209] them indicate? You wrote in those pads as the questions or the matters contained therein came up, is that correct? A. I did.

Q. At the time they came up, is that correct?

A. That is correct.

Q. Now, do these reminder pads also contain notations and so on, showing what you did on the particular day, to some extent? A. They do.

Mr. Lucking, Jr.: Would counsel care to examine any of them?

Mr. Hollingsworth: No. If you say his pads

(Testimony of Dr. Charles T. Butler.)

don't show any receipted stock, it is all right with me. I am not questioning it.

Q. (By Mr. Lucking, Jr.): Doctor, was it your habit in keeping these pads to put down matters such as a stockholders' meeting or other meetings when you received notice of those?

A. Most definitely.

The Court: Would that be true even if it were a meeting you did not intend to go to?

The Witness: Yes.

The Court: What was your object in keeping a record of meetings scheduled, but which were not intended to be visited by you?

The Witness: Well, your Honor, I was leading a very [210] active community life at that time, and associated with many organizations, with board meetings and committee meetings, as well as social engagements. And everything that came before me in the nature of an invitation or a due meeting went down on these pads.

I checked them with a check, when I attended them. I either put a zero or left them blank when I didn't. It is a very complete record of my activities and scheduled activities.

The Court: Did you hold shares in any other corporation at that time?

The Witness: Oh, yes.

The Court: Do your records show receipt of notice of annual meetings of any of those?

The Witness: They do not. All my common stockholdings were in the name of my broker in

(Testimony of Dr. Charles T. Butler.)

New York, who collected the dividends and I didn't bother with them.

The Court: All right. Mr. Hollingsworth?

Mr. Hollingsworth: Is that the only stock you owned, the holdings in the common stock in your broker's name?

The Witness: Will you repeat that question?

(The question was read.)

Mr. Hollingsworth: Is it your recollection that you owned no other stock of any kind or nature, other than the Ojai Mutual Water Company stock that stood in your name in the year 1935? [211]

The Witness: I would think that would be the case, inasmuch as—may I enlarge on that answer?

Mr. Hollingsworth: Well, I am just asking you if you held other stock in your name, any other stock of any kind.

The Witness: Probably some other stocks my broker had in safekeeping may have been in my name, because I believe I did receive some annual reports from New York corporations.

Mr. Hollingsworth: Did you note it in your 1935 diary or whatever it is?

The Witness: Not in connection with those, no.

Mr. Hollingsworth: That is all.

Q. (By Mr. Lucking, Jr.): Dr. Butler, do you have an item in your book in 1933 with regard to a meeting of the shareholders of Ojai Mutual Water Company? A. I do.

Mr. Hollingsworth: That is objected to as in-

(Testimony of Dr. Charles T. Butler.)

competent. That is prior to the amendment, your Honor, two years prior.

Mr. Lucking, Jr.: Counsel, this goes to the weight to be attached to these things.

The Court: He answered very quickly to that one.

Mr. Hollingsworth: I move to strike the answer as incompetent.

Mr. Lucking, Jr.: It goes to the weight, your Honor, showing that he offered to show by this that he received a telephone call to come down——[212]

The Court: We are not going further into that particular one. But the motion to strike is denied.

Mr. Lucking, Jr.: As I understand your Honor's ruling, you don't want to go in further to the 1933 entry with regard to this Water Company meeting?

The Court: What is your point?

Mr. Lucking, Jr.: It is merely to fortify our contention these are an active and actual and valuable reminder of this type of thing.

The Court: You can show that particular attention was given to the Water Company's stock, if that is the purpose of your inquiry, and hence there would likely be an entry if there had been a notice. You may show that.

Mr. Lucking, Jr.: That is what I would like to do, your Honor.

The Court: All right.

Mr. Lucking, Jr.: Subject to a motion to strike if it is not proper.

(Testimony of Dr. Charles T. Butler.)

Q. (By Mr. Lucking, Jr.): Did you, Doctor, in 1933 receive a communication——

The Court: He said he had.

Mr. Lucking, Jr.: Yes.

Q. (By Mr. Lucking, Jr.): Will you refer to your 1933 notes and explain to the court what the notes say and what happened at that time? [213]

A. Under the date of March 6, 1933, I have a notation that the Ojai Mutual Water Company—Ojai Mutual Water Company annual meeting at 3:00 p. m.

Q. Would you state the circumstances under which that was written, Doctor?

A. My memory of the circumstances is that I was called up from the office of the Ojai Mutual Water Company and asked to attend a meeting, inasmuch as they didn't have a quorum.

Q. Did you attend?

A. I did attend that meeting.

Q. Now, Doctor, did you at my request examine your books for the years 1934 and '35, with particular reference to any notice of this 1935 stockholders' meeting of the Water Company?

A. I did.

Q. Did you find any notation indicating any notice had been received by you of any sort?

A. None whatever. [214]

* * *

Q. (By Mr. Lucking, Jr.): Doctor, when you purchased your property and obtained the 10 shares

(Testimony of Dr. Charles T. Butler.)

of water company stock with it, how many acres of land was in that parcel?

A. You refer to the first purchase?

Q. That is the question.

A. Ten acres.

Q. And for those 10 acres with a home, you received 10 shares of stock; is that it?

A. That is correct. [217]

* * *

Cross-Examination

By Mr. Hollingsworth:

Q. Just one question, Doctor. This land that you [221] purchased, and to which you were furnished water by the Ojai Mutual, that was not purchased from the Libbeys, was it?

A. No.

Q. That was non-Libbey land, so-called?

A. Which purchase are you referring to?

Q. I am referring to the purchase that you referred to.

A. Well, I bought two places in Ojai.

Q. I am referring to the one you testified to.

A. With the 10 shares?

Q. Yes. That was not purchased from Libbey?

A. No.

Q. Or any of the so-called Libbey land?

A. Oh, it was within the Libbey land, yes.

Q. But you did not derive title from Libbey?

A. No.

(Testimony of Dr. Charles T. Butler.)

Q. You bought from somebody other than Libbey? A. That is right.

Q. And you got water? A. Yes.

Mr. Lucking, Jr.: Your Honor please, I think this is outside the scope of the direct examination, and I object to it, and move it be stricken.

The Court: I am trying to avoid having to bring the doctor back, and having both sides here, I will rule upon admissibility at a later time. [222]

Mr. Lucking, Jr.: Then is it understood, your Honor, we have reserved our objections?

The Court: Yes.

Mr. Hollingsworth: Certainly, that is understood.

The Court: State them here now. They are just stated for guidance of counsel, so they may reframe the question.

Q. (By Mr. Hollingsworth): You got water from the Ojai Mutual? A. I did.

Q. On land that you did not purchase from the Valley Company or from Libbey or Mrs. Libbey?

A. Yes.

Q. Are you getting—you are not a customer now, are you? A. No.

Q. You own stock? A. That is right.

Q. You are not billed for any water?

A. Not from——

Q. By the Ojai Mutual? A. No.

Q. You are not getting water from them?

A. Except indirectly.

Mr. Lucking, Jr.: Your Honor please, may I

(Testimony of Dr. Charles T. Butler.)

interpose an objection again? I want to reiterate my objection, that this [223] is beyond the scope clearly.

Mr. Hollingsworth: Naturally.

Mr. Lucking, Jr.: Counsel, wait a minute, please.

Mr. Hollingsworth: That is understood.

Mr. Lucking, Jr.: Clearly beyond the scope of the direct examination, and that if the Court finds this is beyond the scope of the direct examination, that to that extent, to the extent it is beyond the scope of the direct examination——

The Court: Make him his own witness.

Mr. Lucking, Jr.: That the doctor is defendants' witness.

The Court: Surely. [224]

* * *

RAWSON B. HARMON

recalled as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified further as follows: [227]

* * *

Direct Examination

By Mr. Hollingsworth:

Q. Mr. Harmon, you were here in court yesterday when Mr. Lucking testified relative to a conversation that he stated that he had with you at the Ojai Mutual Water Company offices in Ojai, when

(Testimony of Rawson B. Harmon.)

he testified, in substance, that you stated to him that no notice was necessary to give to him, in order to amend the Articles of Incorporation.

Did you hear that testimony?

A. I did, yes.

Q. What is your recollection of the conversation? Will you state it, please?

A. It is a long time ago. What was the date of that conversation? Can I ask that to be given?

Mr. Lucking, Sr.: It was the spring of 1948.

Q. (By Mr. Hollingsworth): Spring of 1948.

A. Yes. It is a long time ago. Mr. Lucking came in and wanted to see the things in the office there that we had. And we practically gave him carte blanche to look over everything he wanted to look over.

Q. Speak up just a little louder.

A. To look over anything that he wanted to look over in the books of the company, and we had some conversation. I can't absolutely recall exactly what was said at the time. But I was under the impression that he was asking about the [228] annual meetings, and, of course, I think that what I said at that time was that under our bylaws there was no obligation whatever to give notice to the stockholders of the annual meeting.

Q. Is that your recollection of what you stated to him?

A. That is the recollection I have of that time, yes.

(Testimony of Rawson B. Harmon.)

Q. Did you state anything to him about amendment of the bylaws?

A. I do not recall anything.

Q. Or the Articles of Incorporation?

A. I do not recall anything of that nature, no.

Mr. Hollingsworth: That is all.

Cross-Examination

By Mr. Lucking, Jr.:

Q. Mr. Harmon, just to try to refresh your memory of 1948——

The Court: I think he is going to have difficulty hearing you.

Mr. Lucking, Jr.: I am sorry.

The Witness: You had better come up a little closer.

Q. (By Mr. Lucking, Jr.): Mr. Harmon, just to try to refresh your memory with regard to this 1948 meeting with Mr. Lucking, didn't he at that time tell you that he had never before seen this 1935 amendment?

Mr. Hollingsworth: That is immaterial, whether he had [229] seen them or not. I object to it as improper cross-examination.

The Court: Sustained.

Mr. Lucking, Jr.: This——

The Court: What is the materiality?

Mr. Lucking, Jr.: To try to refresh Mr. Harmon's memory, your Honor, and it was Mr. Lucking's testimony, as I recall——

(Testimony of Rawson B. Harmon.)

The Court: For that purpose it is allowed.

Q. (By Mr. Lucking, Jr.): Do you recall the question now, Mr. Harmon?

A. No. Say it again.

(The question was read.)

The Witness: I couldn't remember that. It is my impression we simply discussed he had not received notices of the annual meetings, and I told him that under our bylaws it was not necessary to—my understanding was it was not necessary to notify stockholders of the annual meetings.

Q. (By Mr. Lucking, Jr.): Did Mr. Lucking at that time refer to the 1935 amendment, changing the shares from four per acre to one per acre?

A. I don't remember.

Q. You have no recollection of that?

A. I have no recollection of the change of the stock.

Mr. Lucking, Jr.: I have no further questions.

Mr. Hollingsworth: That is all. [230]

* * *

Mr. Hollingsworth: May it please the court, counsel: Addressing myself to your Honor on the issue now before the court, respecting the validity of the March 4, 1935, amendment to the articles of incorporation of the Ojai Mutual Water Company, I first desire to call the court's attention to the fact that it is pleaded in Mr. Lucking's complaint that his first purchase of land in the service

area occurred on the 11th of January, 1928. That first purchase, I should say, consisted of 15.98 acres, almost 16 acres. His second [232] purchase occurred——

Mr. Lucking, Jr.: Excuse me, counsel. What paragraph is that, so that I can follow you?

Mr. Hollingsworth: I am reading from the brief here, but it is in your pleadings. I think it is the seventh or eighth paragraph.

Mr. Lucking, Jr.: I am sorry. I have got it. Thank you.

Mr. Hollingsworth: He purchased on September 26, 1930, an additional 33.32 acres.

Again he entered into a contract for the purchase of land on the 21st of May, 1945, and that was the third transaction, for 20.82 acres of land.

As to the water shares, it is alleged and set forth, and I don't think it is disputed, that he received on the last transaction one share per acre.

Now, to determine whether or not the amendment was valid, we first must consider Section 312 of the 1933 Civil Code, which was the Code in force and effect at the time of the amendment to the articles.

There is nothing in Section 312 requiring any notice to be given of an intended amendment to the articles. [233]

The section was amended. In 1937 Code there appears an amendment there. I will read the original Code section as it stood at the time of the particular amendment in question.

312, "Shareholders Meetings. Directors of every

corporation shall be elected annually at a meeting of the stockholders, known as the annual meeting. Such meeting shall be held at 11:00 o'clock a.m. on the first Tuesday in April at the principal office of the corporation, unless a different place or time is provided in the by-laws. When the annual meeting is not held, or the directors are not elected thereat, directors may be elected at a special meeting held for that purpose, and it shall be the duty of the president and vice president or secretary, upon the demand of any shareholder, entitled to vote, to call such special meeting."

That is the extent of the Code section at the time this amendment was adopted on the 4th of March, 1935.

Now, going to the sections in the Code, in the 1933 Code, which have already been referred to, your Honor, under a specific chapter heading, where we find that under Chapter XIII of the Civil Code, Sections 361, 361(a), 361(b), 362, 362(a), 362(b), 362(c), all under the heading of Chapter XIII, "Organic Changes, Merger, Consolidation and Amendments." [234]

The first section refers to mergers and consolidations, 361.

The next section goes over and 361(a) goes to "Mergers and Consolidation of Domestic Corporations."

361(b), "Conveyance of Real Estate of Consolidation."

362 is the section that is pertinent here. "Amendment of Articles."

"By complying with the following provisions, a corporation may amend its articles for any or all of the following purposes":

Then it has 11 separate provisions in respect to which the Articles may be amended, to Adopt a New Name; To Change or Add to its Power or Purpose; To Change the Location of its Principal Place of Business; To Remove any Provisions of Its Articles Limiting Its Term of Existence—" To increase, I should say—yes, that is right. "To Remove any Provisions of Its Articles Limiting Its Term of Existence."

"(5) To Increase or Decrease the Authorized Number of Shares.

"(6) To Provide for the Classification of Its Shares.

"(7) To Change the Statement As to Its Shares.

"(8) To Authorize the Board of Directors Within Limitations to Restrictions to Fix or Alter from Time to Time the Dividend Rate. [235]

"(9) To Change Shares Having Par Value into the Same or a Different Number of Shares.

"(10) To Create Classes of Par Value Shares.

"(11) To Add to, Omit from, Remove or Otherwise Alter the Provisions Thereof in any Respect Lawful at the Time of the Amendment and not Inconsistent with the Law under Which the Corporation Exists * * *"

Then we go over to 362(a), which sets forth the vote required to amend the Article.

"A resolution providing for any amendment of the Article must be adopted by the vote of the ma-

jority of the directors of the corporation, and must be approved by the vote or written consent of shareholders or members holding at least a majority of the voting power either before or after the adoption of the resolution by the Board of Directors. Such resolution must establish the language of the proposed amended Articles by providing that the Articles shall be amended so as to read as therein set forth in full, or that any provision thereof, which shall be identified by stating the numerical or other designation given it in the Articles or by stating the language thereof, be amended so as to read as therein set forth in full, and/or that the matter stated in [236] the resolution be added to or stricken from the articles;

"Change in Shares. If the purpose of an amendment of the articles is to change the preference or restrictions of any class or series of issued shares, or to authorize the corporation to levy assessments on fully paid shares, then in any such case the amendment must be adopted by the vote or consent of the stockholders of at least two-thirds of the issued shares of each class regardless of limitations or restrictions on the voting power."

Now, the record shows here the certificate of the Secretary of State, the amendment itself, the resolution accompanying it, which all were showing there were 1,740 shares out of 2,003, which gives, or, which brought it considerably above the two-thirds requirement set forth here in Section 362(a).

Then it goes on to specify a change in the number of directors, et cetera. Then it says:

"Approval of the Change. The resolution or consents of such shareholders approving any amendment must contain a copy of the resolution——"

which was done here.

"——of the directors or shall establish the wording of the proposed amended articles by providing that the articles shall be amended so as to read [237] as therein set forth."

All of which was done here, from the exhibits in evidence.

"Or that any provision thereof, which shall be identified by the numerical or other designation given it in the articles or by stating the wording thereof, be amended so as to read as therein set forth in full, and/or that the matter stated in the resolution or consent be added to or stricken from the articles, and state the fact of the approval thereof."

All of which was done.

Now we come to the Certificate of Amendment. Very elaborate provisions here, under this Chapter, your Honor, for the amendment of the Articles; minute in detail, specific. [238]

Then it goes on, in Section 362-b:

"After such approval has been given, the president or a vice president and the secretary or an assistant secretary shall execute a certificate, which shall be verified by their oath and shall set forth:

"Contents. The time and place of the meeting of the board of directors;

"A copy of the resolution adopted thereat;

"The vote in favor of such resolution;"——

all of which is in evidence before your Honor——

"The time and place of the meeting of the shareholders or members"—all of which is here—"and the total vote by which such resolution was approved," all of which we have.

Then, "Filing of certificate. The certificate shall be submitted to the Secretary of State, who shall file the same and put an endorsement of filing thereon if he finds that it shows a compliance with the provisions of this section. Thereupon, the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto, certified by the Secretary of State, shall be evidence of the performance of [239] the conditions necessary to the adoption thereof.

"A copy of said certificate certified by the Secretary of State shall be filed with the county clerk of the county in which the principal office of the corporation is located and in every county in which the corporation holds real property."

Therefore, we have offered in evidence the certificate that it was filed with the County Clerk of the County of Ventura, with the certificate of the Secretary of State attached thereto.

Now, it is our contention that, first of all, at the time that this amendment was adopted there was no provision of any kind in the Code requiring the giving of notice. All the sections to which I have

referred, your Honor, are significantly silent. They have no notice requirements at all.

The Court: Aren't they to be read in conjunction with 312, as it then existed?

Mr. Hollingsworth: As it then existed, and 312 had no provisions of notice in it at that time. 312, under this Code, had no notice—had no provisions for notice at all.

Now, we come to this point: Did the Secretary assume——let's assume for the sake of the argument that notice was required. Then the question before the court is: Was notice given?

Is there any substantial testimony before the court to [240] the effect that notice was not given?

The only testimony before your Honor is testimony purely negative in character.

It is like a railroad crossing accident. The witness takes the stand, or a dozen witnesses take the stand and they say that the whistle was blowing, the bell was ringing, the wigwag was in operation. Then they call some other witness who was in the immediate vicinity, and he says he never heard a whistle, he never heard a bell, or he never saw the wigwag operating. Purely negative testimony.

The only testimony before your Honor is that purely negative in character. The statement that somebody did not get a notice through the mail, assuming that notice was required, is purely negative.

If there were any other testimony before your Honor in the minutes of the corporation, by any officer, by any director, by anyone present at this

meeting, that no notice was given, that no directions were ever made to mail out notices of an intention to amend, then we would have a substantial conflict in the testimony. That I grant.

But it is a strange thing that this would go on for over 15 years after the amendment, and for some five years, or I think seven years, after Mr. Lucking's last purchase, when he took under the amendment, before he filed his lawsuit. [241]

Now, what is the court to do if you feel that there is anything in the statute requiring notice? Here is a corporation that has been running along for over 20 years under this amendment. Many people have purchased land, both from Libbey and from outside sources, and have had stock issued to them, and they are receiving their water.

Is it the policy of the court to go back and tear apart, and try to shatter into bits a situation which has been going along for approximately 20 years uncontested and unquestioned?

I will come to the merits of the contention of whether or not it means anything in this case if the amendment is either good or bad. But isn't it the policy of the court to adopt the strong language of the Code itself when the certificate bears the imprimatur of the Secretary of State—a man who is supposed to know his business, and which the Code says, when he certifies it, is evidence of the compliance with the necessary requisites in order to bring the amendment into effect?

That type of evidence, your Honor, seems to me, if there is any question in anybody's mind about

whether or not notice was given, assuming that notice was given, should settle the matter and put it at rest.

Now, a very significant thing here that I have checked into, and I am taking over the new Corporations Code. The amendments to articles are found in Sections 3600 to 3604—[242] 3600 to 3604, and there is nothing in the present Code requiring the giving of any notice to amend the articles of incorporation.

I think what they have done is they have gone right back to the old practice in 1933 and for years prior to that time.

Section 312 was amended—and I checked through Valentine on Corporations, and all the corporate law I could find, and at one time in California it was necessary to publish in a newspaper a notice to amend the articles of incorporation. That was eliminated by statutory amendment, and under Section 312 here there was no notice. That section was added by the statutes of 1931.

Now, prior to that time under the McDermont case here, it was necessary to give notice in order to amend, and that was completely eliminated. The early history—when I mentioned Section 312, I meant Section 362. I beg your pardon, because Section 362 under the early amendment showed that notice was at one time required in order to amend the articles. Now, 361 to 361-b were amended to eliminate that provision.

The case of McDermont v. Anaheim Union Water Company, 124 Cal. 112, held that the amendment to

the articles of incorporation has never been adopted or approved by a vote or written consent of the stockholders of said corporation representing at least two-thirds of the subscribed capital stock [243] thereof, nor has any notice of the intention to make said amendment been advertised in any newspaper published in the town or county in which the principal place of business of said corporation is located—that was the requirement at one time of Section 362, and that has been completely eliminated.

Now, under these other sections of the current Corporations Code, it has here Sections 3600 and 3601. 3600 is amendments relating to, "Adopting new name: Changing powers: Changing location of principal office: Changing number of directors."

Section 3601 is, "Amendments relating to shares," and Section 3601 says, "By complying with the provisions of this chapter," and the chapter that I refer to is Chapter 1, Part 8, under the heading, "Amendment of Articles."

"By complying with the provisions of this chapter, a corporation may amend its articles for any or all of the following purposes:

"To increase or decrease the authorized number of its shares," and to provide for the classification of its shares, to change the statement as to shares issued or unissued, to authorize the board of directors to fix or alter the dividend rights, to change shares having par value into the same or a different number of shares without par value, to create classes of par value [244] shares together with classes of shares without par value, and so forth.

There is no provision whatsoever in Section 3601 requiring the giving of any notice, and the legislative history of the entire situation must show that the courts in their decisions and the text writers in their commentaries have proceeded upon the theory that no notice to amend the articles was necessary, unless this newspaper notice, that was required prior to the decision in the McDermont case.

The Court: Doesn't this argument rather lead you to believe that those advising the corporation at the time were of the opinion that no notice was required, and that no notice was actually given?

Mr. Hollingsworth: I don't know, your Honor. I can't tell. That is what we tried to find out, but we were unable to find it out. It was done by a very strong and reputable law firm, and that exhibit, the certificate of the Secretary of State, shows it is on their legal paper.

The Court: Was it Robert Clark?

Mr. Hollingsworth: No, he organized the corporation, but the amendment shows on the legal paper here of Sheridan, Orr, Drapeau & Bates, and they were the law firm whose name is shown here in the lower left-hand corner.

It is on their stationery, and I can say to your Honor that it is one of the affidavits in the case here that they had destroyed their records. [245]

At the time, acording to the affidavit, I think they cleaned up their offices and threw out everything. I don't know whether it was five years old or fifteen years old, or what it was, but, anyway they destroyed it.

And reading between the lines, it is my feeling that a law firm of that stature certainly weren't going to amend the Articles of Incorporation of this company, without knowing what they were doing. And it is my feeling in the matter that if notice was required it was given. Unfortunately, we cannot get the file. The file has been destroyed. That would have answered the question.

The Court: Would it not be inconsistent for this court to find, or, to conclude that notice was not required and then to find that notice was given?

Mr. Hollingsworth: That is very true your Honor. But if notice was required, then according to the evidence before the court, notice was given.

I don't know, I think the Code sections speak for themselves, your Honor. If there was no requirement in the 1933 Code for notice, then the matter takes care of itself. But if there was a requirement for notice, there is ample testimony before the court to the effect that notice was given, because, as I have said, there is no substantial conflict against the presumption that if notice was required, notice was given, when the Secretary of State permitted the filing of [246] the Articles of Amendment and put his certificate on it.

Now, there are other things here under this amendment. Whether or not the amendment was valid or whether it is proper under the circumstances, I am prepared to argue that. But I think that that is a little bit outside the issues before the court; as I understand, the only issue be-

fore your Honor is, was notice required, and if notice was required, was notice given. I think that is it.

Mr. Lucking Jr.: If your Honor please, were you going to correct that impression in accordance with the statement made immediately prior to recess at 11:00 o'clock? I believe the whole question was up.

The Court: State your position and——

Mr. Hollingsworth: You mean you want me to argue other phases of the case?

The Court: He said am I going to correct an impression——

Mr. Lucking, Jr.: I had understood that our argument at this time would also go to the question of whether or not the 1935 amendment was valid, regardless of whether notice was or was not given, or even notice was or was not required. Is that correct?

The Court: What the court intended was that we argue, have argument now on what Mr. Hollingsworth has argued, and then any other motions which will pose any other legal questions will be made by whoever feels they want to make them, [247] so that by the end of adjournment this afternoon we will have our way clear on these legal questions.

Mr. Hollingsworth: I can proceed to do that now.

The Court: All right.

Mr. Hollingsworth: I will address myself very briefly to your Honor at this time on the validity of the amendment itself, which was necessarily as-

sumed it was made in accordance with statutory provisions and regulations, covering that in the argument.

Now, the question is, is the amendment valid, assuming it was properly adopted, in the first place? My answer is an unqualified yes, because under the so-called business and judgment, the business judgment rule of the Delaware courts, adopted in California, and expressly referred to in Ballantine & Sterling's California Corporation Laws, page 377, Section 306, reads as follows:

"The 'business judgment' rule of the Delaware courts, which is generally followed, giving wide discretion to directors and to majority shareholders, the presumption of good faith and fairness on the part of the directors and majority vote of the shareholders, and the consequent heavy burden of proof upon a dissenting minority to induce the courts to substitute their judgment for that of the directors and shareholders all operate [248] to restrict the equitable limitations upon unfair action for the most part to instances of fraud and confiscation. The burden of justification of an amendment making drastic changes in the contract rights of a class of shares, where the interests of the management and of different classes of shares conflict, ought obviously to be put upon the proponents of the plan to show a reason justifying such scaling down in the needs and exigencies of the corporate interprise, a doctrine recognized in the De Mello case."

We have no such situation as they had in the De Mello case, But the presumption is that the direc-

tors and officers and 1,740 of the represented shareholders acted in good faith.

We allege and set forth in our pleading, and if we have to we are prepared to prove why we reduced the requirements of four shares per acre to one share per acre. It was an economic factor, which the directors were faced with, and it can be explained in detail.

The De Mello case is reported in 73 Cal. App. (2d) 746. That was a reorganization case, and, of course, is entirely different from this case.

Now, the Delaware business judgment rule, which I have referred to, is, as I understand it, the rule in California, and is adopted by the courts here, as I have stated it to [249] your Honor.

It hardly works out with the court, in view of the evidence before you now, to make any holding or any finding to the effect that the amendment itself is not proper and was not valid from the standpoint of corporate business practice. We didn't deprive anybody of any shares. Everybody was left exactly as he was on the date of the amendment.

It only applied to future purchasers of stock in the Water Company. It had no bearing or any effect whatsoever, no harm, no injury of any kind was done to any stockholder of record, as of the date of the amendment. Although their rights were reserved, they still got their water, and continue to get their water right up to the present moment, and so are all of the shareholders who purchased stock

in the corporation subsequent to the date of the amendment.

Now, I want to make a motion at this time, may it please the court, to refuse to receive any evidence under the Complaint Nos. 13,197-T and 15,-804-T on the grounds heretofore urged upon the court, that the whole matter, before your Honor is purely a question of law.

The Articles of Incorporation, as I have previously stated, show the stock to be non-appurtenant. It doesn't make any difference, your Honor, one way or the other, whether the stock is or is not appurtenant, so far as the issues in this case are concerned. [250]

All it means is this: If the stock is appurtenant, which, under the Articles it is not, and which we claim it cannot become legally appurtenant without a compliance with the statutory provisions to which attention has been called, but let's assume that the stock is appurtenant. Certainly, Mr. Lucking's stock is not appurtenant. He doesn't so allege, and, as a matter of fact, it is not. He won't deny it.

But assuming that it is or could be made appurtenant, that doesn't alter the situation at all. It just simply means this: That if somebody has a share of stock appurtenant to a hundred-foot lot or a ten-acre tract of land or a fifty-acre tract of land, it simply means when the land is sold the stock goes with it. So what?

In other words, you couldn't pass title to his stock, he couldn't, to somebody else, without transferring his land with it. But that is all taken care

of under the Articles, because we say specifically in our Articles the ownership of stock or the ownership of land doesn't entitle the user to water. That is purely an issue of law, whether it is appurtenant or non-appurtenant.

Now, we can't——

The Court: I take those remarks to mean that you have a contingent motion, that you want me to refuse to receive evidence and not receiving any to thereupon dismiss the complaint? [251]

Mr. Hollingsworth: Yes.

The Court: Those are the motions we will have to rule upon.

Mr. Hollingsworth: That is true. Those motions are now before—I think I have already made the motions and they are before the court.

But I can, on other motions here, I can make relative to the testimony that came in here this morning, that would have to depend on your Honor's ruling on these other motions.

The Court: We have a decision to make on this question of whether the Articles are validly amended.

Mr. Hollingsworth: Correct.

The Court: That is one cause of action.

Mr. Hollingsworth: Yes.

The Court: The other causes of action are attacked by a motion for an order of the court that no evidence be received. And then there is a motion contingent upon the granting of the motion I have just referred to, to dismiss the complaint.

Mr. Hollingsworth: Yes, your Honor. That is true, but, your Honor, the original motion that was

made here was also to dismiss on the same grounds the cause of action, alleging the invalidity of the amendment, because it appears on the face of the pleading here that the amendment to the Articles was filed, it was filed with the County Clerk, with the certificate of the Secretary of State attached thereto. [252]

It all comes down, aside from this question of the validity of the amendment, to an assertion on your part that the plaintiff has not set forth a claim upon which relief can be granted to him.

Mr. Hollingsworth: That is right. If he has, it is purely a question of law from the pleadings, and there is no need to take testimony. Your Honor can decide it, as a matter of law. [253]

* * *

Mr. Hollingsworth: What I was about to say was this, your Honor: That the plea of Mr. Lucking, in an endeavor to answer the contentions which have been made here concerning the actual record in the case, went as far afield and with as little relevancy to the matter before the court as could possibly be imagined.

Mr. Lucking has attempted here to make what I would determine to be a final argument to a jury in some kind of a case involving passion, prejudice, or an emotional attitude on the part of the plaintiff here, which is entirely beside the issues before the court.

He has made no comment or reply to his own

specific [318] causes of action. He has talked about a pile of $20,000,000, back in Toledo. [319]

Is that going to impress the court?

He has talked about homeowners, home lovers. Is that going to impress a court?

Is there anybody here as a plaintiff in this action except Mr. Lucking?

Your Honor asked if it were a class action. We filed a motion here before this court under Rule 23, and there is absolutely no allegation in his complaint relative to a compliance with that rule, in the slightest degree.

If it is a class action, he at least should have done one thing for these suffering and downtrodden stockowners in the Mutual Water Company—who are up there practically, according to his plea to the court, in a state of bondage, mere children, mere pawns of the Valley Company.

There is no statement at all here in his pleadings, or any allegation in his pleadings that the plaintiff at the time of the transaction of which he complains, or that the action was not a collusive one to confer on a court of the United States jurisdiction of any action.

The complaint should also set forth with particularity the efforts of the plaintiff to secure from the management, directors or trustees, and, if necessary, from the shareholders such action as he desired, and the reasons for his failure to obtain such action, or for not making such effort.

Now, these stockholders, these poor stockholders, who [320] have been going along for 35 years without a complaint, without a grievance, and nobody

has ever complained of water service, water rates, treatment or dealings at the hands of the Water Company except Mr. Lucking, and yet he has the effrontery to come into this court and contend that he represents a class action.

Your Honor, there is no more of a class action here than to come in here in a personal injury case and allege that you are bringing your action in order to correct reckless driving or negligent driving on the highways of this state. It is just about as implausible and just about as ridiculous as that.

If all these terrible things that Mr. Lucking has talked about have actually continued up there for all these years, and these poor homeowners are in fear, in trepidation of what is going to happen, what is going to occur, who is going to get the water, and what is going to go on, well, he might just as well have addressed your Honor as to what would happen if an atomic bomb were to fall down here next week.

Then he talks about Jarndyce against Jarndyce, a Dickens classic.

Who started this lawsuit? Who filed the second suit, or each of the other suits, and who has kept the thing agitated? Who is appealing to the passion and prejudice, going so far as to say that he submitted a stipulation? [321]

He knows very well that a statement on a compromise of a lawsuit of any kind is absolutely inadmissible. Yet he does not even hesitate to stand up before your Honor and say that he submitted a stipulation trying to settle this lawsuit.

Well, it never could have been settled on that stipulation, your Honor. I don't like to mention it. I have never referred to it in the progress of this case, and I have kept away from extraneous things that have no bearing upon the motions before your Honor.

What pertinency can it have that somebody can stipulate with him or that somebody would not take a program, and how could I stipulate to: The Valley Company will have to do this; the Valley Company will have to do that; the Water Company will have to do this, or else. But he says it is all on behalf of the poor homeowner.

He is the Sir Galahad charging up in the Ojai Valley to save all these people from destruction and ruin. [322]

The school district doesn't seem to be so concerned about it, the State of California has never gone to the Attorney General's office and demanded something be done here to rectify this terrible situation.

Nobody but Mr. Lucking has ever complained. He can't find one shareholder, one stockholder in that Water Company—and I say it because of the remarks Mr. Lucking has made to your Honor, and for that reason only—he cannot bring a stockholder before your Honor who can complain of water service, water charges or anything in connection with it and he has no cause of action before this court, nor has he attempted to set up one that we, in violation of the by-laws of this corporation, refused to make an assessment of the stock of the

mutual water company, in order to pay for capital investment.

But he doesn't tell your Honor that the money was loaned, interest-free, and that no increase of rates ever occurred, and that it was much cheaper from a financial standpoint on the present and existing water users, at the time the money was loaned, to let them have it interest-free, and to pay it back out of water used, but with no increase whatsoever on water rates; none whatever.

It was just as fair and just as just and just as charitable and just as able as it could possibly have been under the circumstances, but even if it were not true, why [323] didn't he set up a cause of action.

The Court: That issue is not presented by the amended complaint.

Mr. Hollingsworth: It certainly is not, your Honor. But he has argued it here to your Honor, as if it were before the court.

That is the thing I can't understand. I want to go back and review again very briefly the real thing that is before the court. What is before the court?

Now, he has talked about appurtenance, all of his argument, all of his complaints, all of his criticism, all of his fearful speculations here of what might happen or what could happen, or what would happen are pure speculations, pure surmise and conjecture. But all of his talk cannot change the plain equivocal working of the articles of incorporation.

I am staying with the pleading. And he set up in his pleading the articles of incorporation, not only of the Mutual Water Company but also the certificate of amendment to the articles of incorporation. They are all set forth there. He can't talk himself out of that. He can't talk himself into making this stock appurtenant, contrary to the plain provisions of the articles. Nor can he talk himself into making the amendment invalid just because he claims it is invalid. That matter is before the court for [324] your decision.

But let us see now where we come. His first cause of action is based upon a fallacy which appears as a matter of law, and he hasn't answered it, he hasn't attempted to answer it.

Where in his complaint is there any allegation that under the articles of incorporation and under the by-laws of the Mutual Water Company we can furnish stock only to people deriving title from Libbey? There is no such allegation, because the articles of incorporation on their face show that such is not the fact. There is no need to reiterate it, but there it is, the first cause of action.

The second cause of action is based upon the theory of the invalid amendment that is before the court. I need not expatiate on that.

No. 3, he goes back and attempts to try a water suit here. There is nothing before this court, no allegation at all to the effect that any land owned by Mr. Lucking overlies a percolating water basin, a known and defined structure bearing water, and that when the Ojai Mutual pumps its water to any

of its stockholders, that it deprives Mr. Lucking of water he would otherwise receive, or to which he would be entitled. There is nothing of that kind in his complaint; not a thing.

Yet he wants the court, which would necessarily follow, [325] if the court took that at its face value and took his argument for what it was worth, you would have to sit here and try a water suit. But he has not alleged that as an overlying landowner's land, that his real property overlies a basin of water, that he has water or would have water available in sufficient supply were it not for some act or acts on the part of the Mutual Water Company or The Ojai Valley Company. There is no such allegation.

He just throws it in there by way of scenery, claiming that he is being injured as an overlying landowner. No allegation sufficient to support a water suit. Your Honor caught it immediately. You asked him, "Are you asking me to try a water suit?"

Are we going into all the geological factors here on that sort of a pleading? If we did it might take 30 days, it might take two months to go into it. I brought it up on the original demurrer, the original motion to dismiss and pointed out to the court at that time we were not trying or endeavoring to litigate a water case in this court, under any such an allegation.

Now, his fourth cause of action, he claims that we made an unjustified profit on the sale of the stock, claiming that Mr. Libbey had put $100,000 in the water system before the Mutual was formed.

That he turned it over to the Mutual for 2,000 shares at $50 par. [326]

Is there anything unjust or inequitable about that? Didn't he have a right to take out his stock? The permit from the Commissioner of Corporations specifically shows that he was authorized to do it at $50 a share, because he had $100,000 or more in the property at that time. But he took it at a round figure of a hundred thousand dollars.

Now, is it the law of this case, is it the law of this country that 35 years later, when the Valley has progressed, when prices have gone up 50, a hundred, maybe in some instances two and three hundred per cent, that we can't sell this stock, still owning it, if we can find a buyer that wants to buy it, for more than $50? Is that an unwarranted or unjustified profit?

Where is there any cause of action there? Does he allege this was watered stock? That it has a value of five or ten dollars a share and we are compelling people to pay more for it than it is worth, when they want to buy a share? That nobody can get stock up there without having to come in and pay more that it is worth? There is no such allegation in the pleading.

We have a right to our own, we have a right to sell it, we have a right to keep it. We are not compelled to be dictated to by Mr. Lucking, as to what the stock is worth, as to when it shall be cancelled, as to when it shall be taken off the books of the corporation. We can't stand for [327] that,

your Honor, nor do we intend to stand for that on Mr. Lucking's position here.

It is quite apparent that he is full of prejudice, that he is full of animos, and that he is trying here, under the guise of the good shepherd, to come in before your Honor and take care of all these poor wandering sheep up there in the Valley that don't understand their rights, that can't wrestle with this very simple situation, but it is just a little bit too much for them. And along comes Mr. Lucking, who spends a very few days out of the year in the Ojai Valley, and sets up a cause of action here based upon these very things which, on their face, conclusively show they do not state a cause of action, because his whole theory on the calculation of the stock is based upon the proposition that we are holding surplus shares of stock.

How are they surplus? Because he alleges, contrary to the articles, that they can only be furnished to owners of Libbey land and nobody else? That is the thread of the complaint, right from the start to the finish. Nobody else can acquire any shares of stock up there, except the owners of Libbey lands. That is what the court has got to hold, in order to satisfy his demands that we cannot sell a share of stock to anybody that didn't derive title from Libbey.

Yet his own witness here, Dr. Butler, admitted that he got his shares from non-Libbey owners. And there are plenty [328] of others. I don't see why it is necessary for this court to take days of testimony here to determine each transaction. "Well, when you

sold 10 shares of stock, who did those people derive title from? When you sold another 20 shares of stock, who did those people derive title from?"

It could go on and on here, contrary to the plain provisions of the articles themselves.

His fifth cause of action, his sixth cause of action is upon the theory that the stock is appurtenant to the land, despite the fact that he doesn't allege it is appurtenant in his own case. It can't be made appurtenant, except by the statutory provisions.

What concern is it of his—let's assume in this statement—but he doesn't plead it, it is not in his pleading. I think it is entirely outside the issues, but let's assume now he offers proof here, and we did write the word "appurtenant" on some certificate of stock, under certain instances, and assume that we did, does that make all the other stock appurtenant?

Supposing that stock is appurtenant that was issued to some purchaser, and which carried the word "appurtenant" that was written on there, supposing we did do that, what avail is it to him, where does it benefit him, why doesn't he bring an action here to quiet title, or something of that kind, to set up before this court the question as to whether or not [329] this stock should be held to be appurtenant.

There is no such action before the court, except that he alleges, all he does is allege, that it is appurtenant. But he doesn't allege his own stock is appurtenant. None of the stock that he purchased, there is no allegation that he sets forth—he sets

forth every date and every acre that he purchased, but there is not one allegation in that complaint to the effect that that stock that he purchased was appurtenant at all. He just makes a broadside shotgun allegation that the stock in the Mutual Water Company is appurtenant to the land. It is just a talking complaint, just like his argument to the court here. He just kept talking and talking, but he didn't stay on the track.

Certainly, he has handed me something here. I haven't seen it. Minority stockholders, I can't stop and read through this thing. It is all marked up. He has handed it to the court. Your Honor has been deluged with authorities and argument and everything.

I will keep this, unless you want to give me one that hasn't got that writing on there.

Mr. Lucking, Sr.: You want it tonight?

Mr. Hollingsworth: You can give it to me tomorrow.

Mr. Lucking, Sr.: I will hunt for one that is clean.

Mr. Hollingsworth: I don't care about your writing on there. There might be something though you don't want me [330] to see.

Mr. Lucking, Sr.: No, I don't call names in writing.

Mr. Hollingsworth: I don't call names, either, Mr. Lucking.

Mr. Lucking, Sr.: I stopped that years ago.

Mr. Hollingsworth: You have questioned my

honesty here. You got up and said something about my honesty, when you were arguing to the court.

All I can say is this: If I am going to take a lesson in honesty, I think you will be one of the last men I will call on for that matter. [331]

I don't think it was justified when you said it, and I still feel you have strayed clear off the reservation here in your argument to the court.

I am willing to stay with the record in this case, and I still maintain, your Honor, that he has no standing under this pleading before this court.

I renew the motion in good faith and in all sincerity.

The Court: The court reaches the conclusion as to Section 312 of the Civil Code, as that Code existed at the pertinent time, that notice was required to be given of a shareholders' meeting, even if it was a regular annual meeting, provided that it was a meeting at which it was provided to amend the Articles of Incorporation.

The evidence which has come in here on the cause of action, relating to the alleged meeting as to the amendment, being, particularly the evidence there were other meetings, as to which there was no notice given, was not actually pertinent evidence, because there was no showing that those other meetings were meetings of a kind, which, under Section 312, required notice.

There is no need for notice of a regular annual meeting unless it was a meeting to take up a particular class of subject. There is a presumption of regularity, or, rather, there are a group of pre-

sumptions which relate to regularity. You will find them enumerated in the California Civil Code, or [332] they were last there when I last had occasion to find out where they were. They are in the evidence sections somewhere under those presumptions, and I think there are presumptions in the common law as well of the actions of the management of the defendant in calling the meetings would be presumed to be regular. [333]

It would take evidence to repel that presumption.

The court finds that there is not sufficient evidence to overcome the presumption of regularity with respect to the amendment of the articles of incorporation.

That I think was pleaded as a separate cause of action, and as the court has taken evidence on that cause of action, and has reached that conclusion, I suppose that judgment should be ordered, and it is ordered for the defendants upon that cause of action. [334]

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